92-1544

Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PACIFIC LEGAL FOUNDATION,
Petitioner,

v.

PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX; JACK BOWEN MCCLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court may appropriately exercise "inherent power" to impose sanctions arising from an attorney's litigating behavior, not on the attorney individually, but upon a non-party (in this case a non-profit, public-interest foundation) that is financing the litigation, in the absence of any determination that such a power is "necessary to the exercise of all other[]" judicial powers. *Chambers* v. *Nasco, Inc.*, 111 S. Ct. 2123, 2132 (1991) (quoting *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812)).

2. Whether a district court may appropriately exercise "inherent power" to impose litigation sanctions upon an entity over whom the court has no *in personam* jurisdiction.

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties before the Court of Appeals whose judgment is sought to be reviewed.

In addition to the parties listed in the caption, the following were parties to the underlying district court litigation as plaintiffs: Matthew Lockary, Susan Irland Lockary, Phyllis Gilbert, Charles Gilbert, James Macey, Anton Holter, and Mesa Ranch Limited, a California limited partnership.

Pacific Legal Foundation, the petitioner herein, has no parent or subsidiary companies.

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---

PETITION FOR A WRIT OF CERTIORARI

Pacific Legal Foundation hereby petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., A-1 to A-32) is reported at 974 F.2d 1166 (9th Cir. 1992). The opinion of the United States District Court for the Northern District of California adopting a special master's report imposing sanctions on petitioner (App., B-1 to B-2) is not reported.

JURISDICTION

The court of appeals rendered its judgment on September 9, 1992. Rehearing was denied on December 16, 1992. (App., K-1) This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court's jurisdiction of the underlying action was based on the existence of a federal question (28 U.S.C. § 1331).

CONSTITUTIONAL PROVISION INVOLVED

Article III of the United States Constitution provides in pertinent part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . .

U.S. Const. art. III, § 2, cl. 1.

STATEMENT

Like several others that this Court has considered in recent years, this case raises significant issues regarding the "inherent power" of Article III courts. The issue here is the lawfulness and propriety of a district court's invoking that power to impose fee-shifting sanctions on a nonprofit charitable corporation that was not a party to the litigation before the district court, and over which the district court never acquired *in personam* jurisdiction.

1. *The Underlying Litigation.* Petitioner Pacific Legal Foundation is a California nonprofit public-interest corporation. As a public interest legal foundation, petitioner sometimes provides attorneys to parties who could not otherwise afford to present their claims in court. It is not a law firm, however, and has no license to practice law.

The *only* action taken by petitioner in this case was to authorize foundation staff attorneys to represent the plaintiffs below in their efforts to protect their property rights. Clerk's Record (hereinafter "CR") 690 at

Exhibit F. Petitioner supplied the lawyers and paid them, but was not itself a party to the case and did not represent the parties.

The defendants below were the Bolinas, California, Community Public Utilities District and current and former directors of the district. The utilities district governs the provision of water in Bolinas. In 1971, the district declared a water emergency and imposed a moratorium on new water hookups. This moratorium has been reenacted from time to time and continues to this day, some two decades after the "emergency" was first declared. CR 112 at 12. Indeed, some of the directors of the district ran for election on the platform of maintaining the moratorium as a means of controlling growth in the community. *Id.* at Attachment A, A(8) and A(42).

The plaintiffs below were individuals and a limited partnership (Mesa Ranch) who owned undeveloped property in Bolinas, California. Because the plaintiffs could not obtain hookups to the local water system, they were denied residential building permits, rendering their property essentially valueless.

Plaintiffs filed their complaint on November 10, 1982, alleging several causes of action including antitrust and equal protection violations and a taking of property without compensation. CR 1. Following several years of litigation, the district court dismissed all of plaintiffs' claims. Plaintiffs later appealed this judgment to the Ninth Circuit and won a reversal on their takings and equal protection claims in *Lockary* v. *Kayfetz*, 917 F.2d 1150 (9th Cir. 1990) (App., H-1 to H-5).

2. *The Sanctions Motions.* While the Ninth Circuit appeal was pending, the individual defendants requested sanctions in the district court against the plaintiffs as well as petitioner, but not against any of the individual attorneys for the plaintiffs. CR 498 at 2. Petitioner had not previously appeared in the action. Petitioner filed its first pleadings in the case when it opposed the sanc-

tions motions, arguing, among other things, that the district court lacked *in personam* jurisdiction over petitioner. CR 510 at 1-2; CR 585 at 1-3; CR 648 at 5-6. The district court ignored petitioner's jurisdictional argument and referred the motions to a federal magistrate sitting as special master. CR 543.

Initially, the master proposed to rule that the entire lawsuit was frivolous and had been brought in bad faith. CR 634. In a 119-page draft report (pertinent portions of which are attached as Appendix M), the master argued that none of the causes of action had any merit under the law and that no reasonable attorney could argue otherwise. App., M-6 to M-10. Moreover, the master attributed the sanctionable conduct to petitioner by treating petitioner as plaintiffs' "counsel." *Id.* at M-3. The master therefore proposed to find that petitioner had violated Rule 11 as well as 28 U.S.C. § 1927.

After the master received comments on the draft report, but before he issued a final report, this Court issued its opinion in *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120 (1989). *Pavelic* held that Rule 11 authorizes a court to impose sanctions on an individual attorney who signs a pleading, but does not authorize sanctions against the attorney's law firm. *Id.* at 125-26. This decision forced the master to rethink the legal theory underlying his draft report.

In his Final Report (see App. C), the master reluctantly concluded that the petitioner was beyond the reach of both Rule 11 and 28 U.S.C. § 1927. App., C-4 to C-5. The master went on to rule, however, that petitioner could be sanctioned pursuant to the "inherent power of the court." *Id.* He also continued, without any basis, to treat petitioner as the attorney for the plaintiffs.

The master also withdrew his conclusion that the entire action was completely frivolous and brought in bad faith. Instead, the master proposed to sanction seven specific

instances of litigating conduct. They were: a motion to strike filed by plaintiffs' counsel in early 1983; the assertion of what the master termed a "legally frivolous" procedural due process claim; plaintiffs' change of position on an abstention issue; the alleged "obfuscation" of claims brought by Mesa Ranch limited partnership; an alleged failure to follow an order of the district court to plead with more specificity; the naming of two defendants in the antitrust claims without alleging that they were market participants; and a failure to plead (or prove) that the plaintiffs were market participants. *Id.* at C-104 to C-106.

Without citing any evidence, the master ruled that petitioner was the "sponsor . . . and intended beneficiar[y]" of the offending conduct. *Id.* at C-8. The master further ruled that none of the plaintiffs should be held liable for sanctions. *Id.* at C-43. Ironically, the master also proposed instituting sanctions proceedings against the individual attorneys for plantiffs (App., C-9), but abandoned those proceedings on due process considerations. App. G. The district court adopted the master's report without substantial change. App. B.

During this time, the court of appeals issued the 1990 opinion discussed above (*supra*, p. 3), holding, contrary to the master's view, that the plaintiffs' takings and equal protection claims had merit. 917 F.2d at 1155-57. Petitioner asked both the master and the district court to reconsider their earlier sanctions decisions in light of the court of appeals' ruling, but both declined to do so. Compare CR 690 at 14-18 with App., E-1 to E-105. After further briefing, the master fixed the amount of sanctions at $136,434.50. App., E-105. The district court again adopted the master's report without change. App., D-1 to D-2.

3. *The Sanctions Appeal.* The court of appeals reversed the district court's award of sanctions for the abstention motions and the procedural due process claims. App., A-17, A-19. Sanctions were upheld, however, for the antitrust claims (*id.* at A-23), the alleged failure to

comply with a procedural order (*id.* at A-21), the alleged "obfuscation" of the Mesa Ranch claims (*id.* at A-24), and the filing of the motion to strike (*id.* at A-25). The court of appeals also reversed portions of the district court's order regarding the calculation of the sanctions, but otherwise affirmed. *Id.* at A-26 to A-31.

In so doing, the Ninth Circuit expressly held that the district court possessed "inherent power" to impose sanctions on petitioner. To petitioner's knowledge, no other court of appeals has *ever* upheld the imposition of litigating sanctions upon an entity that is neither a party nor an attorney.

Indeed, the court of appeals began by rejecting the district court's characterization of petitioner as either a law firm or an attorney for plaintiffs. *Id.* at A-11 n.2. Instead, the court of appeals concluded that petitioner could be held liable for sanctions based on the following "facts": that petitioner had contacted and organized the plaintiffs (*id.* at A-6), that the plaintiffs had only nominal interests that were subservient to those of petitioner (*id.* at A-12), that plaintiffs' claims were abandoned after the Ninth Circuit's decision on the merits with the plaintiffs gaining nothing from the litigation (*id.* at A-13), and that the plaintiffs were "pawns or puppets" of petitioner. *Id.*[1] Based on these conclusions,

[1] None of these conclusions has any support in the record. Indeed, the court of appeals' conclusion that petitioner contacted the plaintiffs is contrary to the district court's specific finding that it was the plaintiffs who contacted petitioner, a finding the court of appeals did not reject as clearly erroneous. App., C-15. Petitioner attempted to correct the Ninth Circuit's other mistaken conclusions by filing a motion to augment the record. App. L. Attached to that motion were documents establishing plaintiffs' real and substantial claims (*id.* at L-13 to L-19), setting forth plaintiffs' own protestations that they were not anybody's "pawns" (*id.* at L-5), and documenting the financial settlement plaintiffs received for dismissing their federal claims while preserving their state claims for litigation in state court (*id.* at L-7 to L-11). The court below denied the motion to augment the record and refused to correct its opinion. App. J. Of course, the remainder of this petition assumes *arguendo* the facts "found" by the court of appeals.

the court of appeals ruled that the district court had not abused its discretion by finding that "[petitioner] itself was directly responsible for the sanctioned misconduct" as the "sponsor of this litigation." *Id.* at A-13. Aside from this conclusion, the court of appeals did not address petitioner's objection to the absence of *in personam* jurisdiction.

REASONS FOR GRANTING THE PETITION

This Court has long recognized the existence of certain inherent powers that a court must have in order to function. They include, for example, the power "[t]o fine for contempt—imprison for contumacy—[e]nforce the observance of order, etc." *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). However, any expansion of these powers poses significant risks—to litigants, to our system of federalism, and to the proper balance of powers among the three branches of the federal government. See *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 801 n.10 (1987) (balance of powers concerns); *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980) (inherent powers shielded from direct democratic controls); *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 941 (1991) (Kennedy, J., dissenting) (raising federalism concerns). Accordingly, this Court has been particularly careful to review lower court holdings that expand the district courts' inherent powers—even when, unlike this case, there is no conflict among the circuits. *E.g.*, *Chambers* v. *Nasco, Inc.*, 111 S. Ct. 2123 (1991) (inherent power to sanction a party to litigation); *Spallone* v. *United States*, 493 U.S. 265 (1990) (contempt sanctions against non-party city council members); *Missouri* v. *Jenkins*, 495 U.S. 33 (1990) (judicially imposed taxes). See also *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 230 (1992) (granting certiorari to review 951 F.2d 1128 (9th Cir. 1991), which held that district courts possess inherent power to exclude expert testimony).

This case likewise warrants review, for three independent reasons. First, the Ninth Circuit's unprecedented expansion of the "inherent power" doctrine—to permit the imposition of sanctions on a *non-party* without any finding that such an extraordinary step satisfies the "rule of necessity"—conflicts in several ways with decisions of this Court and with the Fourth Circuit's decision in *Blue* v. *Department of the Army*, 914 F.2d 525 (4th Cir. 1990). Second, the Ninth Circuit's justification for refusing to require *in personam* jurisdiction—*i.e.*, that petitioner was the "sponsor" or "real party in interest" and the plaintiffs were mere "pawns"—conflicts in principle with this Court's decision in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), and the Seventh Circuit's decision in *Panther Pumps & Equipment, Inc.* v. *Hydrocraft, Inc.*, 566 F.2d 8 (7th Cir. 1977), *cert. denied sub nom. Beck* v. *Morrison Pump Co.*, 435 U.S. 1013 (1978). Third, the decision below warrants this Court's close scrutiny because of its significant impact on the attorney-client relationship, and on public interest litigation generally.

I

This Court has warned that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 111 S. Ct. at 2132. To ensure that the lower courts exercise appropriate caution, this Court, various individual Justices, and the courts of appeals have articulated a number of specific limitations on any attempt to expand a federal court's inherent powers.

Three of these are particularly relevant here: First, a district court may not invoke inherent power absent a determination that the exercise of such power is *necessary* to the courts' operation. *Chambers*, 111 S. Ct. at 2132;

Spallone, 493 U.S. at 280; *Young*, 481 U.S. at 801. Second, to ensure adherence to this "rule of necessity," a district court may not invoke its inherent power without first attempting to exhaust whatever powers are available to it under existing statutes or procedural rules. *E.g.*, *Chambers*, 111 S. Ct. at 2141-42 (Kennedy, J., dissenting); *Young*, 481 U.S. at 801. Third, a district court may not invoke inherent authority to make distributional judgments between an attorney who engages in sanctionable conduct and a non-party who is financing the litigation on behalf of a party. *Blue* v. *Department of the Army*, 914 F.2d 525 (4th Cir. 1990).

The Ninth Circuit's decision in this case transgresses each of these limitations. It therefore conflicts with any principled application of the decisions of this Court and the courts of appeals that have articulated those limitations.

1. The very basis for recognizing any inherent powers is that they are necessary to the courts' operation. *Chambers*, 111 S. Ct. at 2132; *Roadway Express, Inc.* v. *Piper*, 447 U.S. at 764; *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 34. As this Court stated in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 451 (1911), "the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper." This Court has therefore held that inherent powers can be exercised only when *necessary* to preserve the authority of the court (*Roadway Express*, 447 U.S. at 764), and "their assertion requires special justification in each case." (*Chambers*, 111 S. Ct. at 2123 (1991) (Kennedy, J., dissenting) (summarizing prior cases)).

The court of appeals offered no such "special justification" for its unprecedented expansion of inherent authority, and its decision plainly breached the "rule of necessity." The court of appeals never even addressed the question whether invocation of inherent powers to sanction a non-party was "necessary to the exercise of all

other[]" judicial powers, as *Chambers* and other decisions require. Rather than asking that question, the court of appeals simply *assumed* that it was necessary to sanction petitioner. The court then set out to find some authority by which to accomplish that objective. See App., A-8 to A-9. Finding that Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 "were not 'up to the task' of sanctioning" petitioner, the court invoked inherent power. App., A-11.

Had the court of appeals undertaken a "rule of necessity" analysis, it would have had no choice but to conclude that imposing sanctions on a non-party in these circumstances is not "necessary to preserve the authority of the court." As the court recognized, the district courts have authority under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 to impose sanctions upon the *attorneys* who appear before them for abusive litigation tactics. Given that enormous power—a power already expressly granted by Congress—a district court clearly does not need to impose sanctions on an attorney's non-party *employer* in order to protect the court's authority.[2]

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[2] Indeed, this case well illustrates the importance of the rule of necessity in avoiding unnecessary judicial encroachments upon congressional authority. As Justice Kennedy observed in *Chambers*, "the American Rule recognizes that the legislature, not the judiciary, possesses constitutional responsibility for defining sanctions and fees. . . ." *Chambers*, 111 S. Ct. at 2142 (Kennedy, J., dissenting); see *Kaiser Aluminum & Chem. Corp* v. *Bonjorno*, 494 U.S. 827, 835 (1990); *Business Guides Inc.* v. *Chromatic Communications Enters., Inc.*, 111 S. Ct. at 940 (Kennedy, J., dissenting); *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 262 (1975). In the Rule 11 context, moreover, Congress has made the judgment that attorneys should be *personally* liable for sanctionable conduct. See *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120 (1989) (law firm not subject to Rule 11 sanctions for pleadings signed by member of firm). The decision below, therefore, is clearly an intrusion upon this congressional power to allocate the costs of litigation, an intrusion that effectively permits courts to circumvent congressional limitations at will.

Application of the rule of necessity in this case would also have avoided a judicial incursion into matters usually reserved to the

In this case, neither court below found, or indeed could have found, that the imposition of litigation sanctions on a non-party was necessary to protect the district court's authority. This Court should grant certiorari to ensure fidelity to this Court's decisions requiring that any exercise of the district court's inherent power be justified under the "rule of necessity."

2. To ensure compliance with the rule of necessity, this Court's cases generally require district courts to "exercise the least possible power adequate to the end proposed." *Spallone* v. *United States*, 493 U.S. 265, 280 (1990) (internal quotations and citations omitted). Applying this principle in the sanctions context, Justice Kennedy has stated that "the proper exercise of inherent powers requires exhaustion of express sanctioning provisions"—in Fed. R. Civ. P. 11 and 28 U.S.C. § 1927—before invoking inherent power. *Chambers*, 111 S. Ct. at 2141 (Kennedy, J., dissenting). Similarly, Justice Scalia has stated that "[a] court must use the [statutorily] prescribed means unless for some reason they are inadequate." *Id.* at 2141 (Scalia, J., dissenting).

Both courts below utterly failed to "exhaust their statutory remedies." Indeed, the master (acting on behalf of the district court) *began* by invoking inherent power to impose sanctions on petitioner, *then* considered (but ultimately rejected on "due process" grounds) imposing sanc-

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States. In general, state laws permitting recovery for malicious prosecution or abuse of process require proof of malice or improper purpose as a necessary element. See W. Keeton *et al.*, Prosser and Keeton on the Law of Torts §§ 120-21 (5th ed. 1984); 1 F. Harker, F. James & O. Gray, The Law of Torts § 4.8 (2d ed. 1986); Restatement (Second) of Torts § 676 (1977). However, the newly found inherent power of district courts to sanction nonparties creates a new kind of liability, one that is akin to tort liability for malicious prosecution—but with a much lower and undefined standard. See *Business Guides*, 111 S. Ct. at 941 (Kennedy, J., dissenting). For reasons discussed above, there is simply no need to intrude into this area of traditional state authority.

tions on the plaintiffs' attorneys under Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. See App., G-1 to G-4. Had the courts below exhausted existing, congressionally authorized remedies before invoking inherent power, the adequacy of those remedies would have been readily apparent.

This Court should grant certiorari to resolve the question whether a district court must make reasonable attempts to exhaust existing statutory authorities before invoking inherent power.

3. By imposing sanctions, not on the attorneys who were before the court, but on their non-party employer, the court of appeals has also placed itself in conflict with the decision of the Fourth Circuit in *Blue* v. *Department of the Army*, 914 F.2d 525 (4th Cir. 1990).

In *Blue*, the district court had imposed sanctions against several individual attorneys, one of whom was employed by the NAACP Legal Defense Fund. The lower court ordered the Legal Defense Fund not to pay any of the sanctions imposed on the attorneys. *Id.* at 549. The Fourth Circuit reversed, ruling that the district court had no power to control the Legal Defense Fund's allocation of its resources. *Id.* In essence, the Fourth Circuit ruled that courts may not make distributional judgments between the attorneys who committed the alleged misconduct and the entity that financed the litigation.

In this case, the district court made the very kind of distributional judgment that the Fourth Circuit held was beyond a district court's inherent power. Rather than sanctioning the *attorneys* who committed the alleged litigating misconduct, the district court required petitioner to bear the financial brunt of its employees' behavior. Under *Blue*, there is little doubt that petitioner would have prevailed before the Fourth Circuit.

This Court should therefore grant the present petition to resolve the conflict between the Fourth and Ninth Cir-

cuits over a district court's authority to make distributional judgments as between attorneys and non-parties who fund their litigation activities.

II

This Court should also grant review to resolve an independent but equally important issue: whether a district court may properly exercise its "inherent power" to impose litigation sanctions upon *any* entity (other than an attorney) over whom the court lacks *in personam* jurisdiction.

1. The district court in this case never acquired *in personam* jurisdiction over petitioner. Petitioner was not named as a party to the litigation and was never served with legal process. See *Federal Trade Comm'n* v. *Compagnie De Saint-Gobain-Pont-A-Mouson*, 636 F.2d 1300, 1318-19 (D.C. Cir. 1980) ("[i]f properly accomplished, service of process confers personal jurisdiction upon a court"); *Gomez* v. *Karavias U.S.A., Inc.*, 401 F. Supp. 104, 107 (S.D.N.Y. 1975) (dismissing London corporation as party where there was no service of process except for service of summons and complaint on U.S. affiliate). Nor did petitioner voluntarily submit itself to the jurisdiction of the court. To the contrary, the *only* reason petitioner ever appeared before the district court was to defend against the sanctions motions, and it consistently asserted in that proceeding (and before the court of appeals) that the court lacked *in personam* jurisdiction. See CR 638 at 2; CR 648 at 5; CR 690 at 2; CR 741 at 1; Appellant's Opening Brief at 12-18, *Pacific Legal Foundation* v. *Paul Kayfetz et al.*, 974 F.2d 1166 (9th Cir. 1992) (No. 91-15384).

The district court sought to escape this difficulty by labeling petitioner as the law firm or "counsel" for the plaintiffs. App. C-1. But the court of appeals rejected this approach and instead characterized petitioner as the "sponsor" of the litigation. App. A-11 n.2, A-12. The court of appeals then proceeded to conclude that the

plaintiffs were mere "pawns" or "puppets" of petitioner. *Id.* at A-13. Thus, although the court of appeals did not forthrightly address the *in personam* jurisdiction issue, the court assumed that the plaintiffs were merely alter egos of petitioner and that the district court could therefore regulate and sanction petitioner's conduct.

That holding is in direct conflict with *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969). In *Zenith*, the district court had entered a judgment against a company that was not a party to the litigation, but whose wholly owned subsidiary was a party. During the litigation, the subsidiary had even stipulated that it could be considered the same entity as the parent corporation, and an officer of the parent had appeared as attorney for the subsidiary. *Id.* at 110. Yet this Court ruled that the judgment could not stand against the parent: "The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." *Id.*

Here, as in *Zenith*, the district court never acquired *in personam* jurisdiction over petitioner. Yet the Ninth Circuit has held that the district court could impose financial liability on petitioner on the very theory rejected in *Zenith*, *i.e.*, that petitioner was the plaintiffs' "alter ego."

2. The Ninth Circuit's holding also conflicts with the Seventh Circuit's decision in *Panther Pumps & Equipment Co.* v. *Hydrocraft, Inc.*, 566 F.2d 8, 23 (7th Cir. 1977), *cert. denied sub nom. Beck* v. *Morrison Pump Co.*, 435 U.S. 1013 (1978). There, plaintiff brought an action for civil contempt against an individual, Louis Beck, seeking to enforce an injunction issued in a prior patent infringement suit in which Beck had not been a party. *Id.* at 11-12. After the district court had issued Beck an order to show cause why he should not be held in contempt, plaintiff moved to substitute Beck *and* Universal Spray Systems, Inc., a corporation wholly owned by Beck,

as defendants in the original suit. *Id.* at 12. The district court denied this request.

On appeal, the Seventh Circuit held that Beck could be substituted, but that the motion to substitute Universal faced "an insurmountable obstacle: lack of personal jurisdiction." *Id.* at 23. It held that because "[t]he district court's order to show cause was directed *only* to Beck[,] it did not bring Universal before the lower court." *Id.* Relying upon *Zenith*, the Seventh Circuit held that "[a]lthough we have held . . . that Universal is merely Beck's *alter ego*, that fact cannot alone confer personal jurisdiction over Universal." *Id.*

Had the Ninth Circuit followed the Seventh Circuit's analysis in *Panther Pumps*, it would have held that the absence of *in personam* jurisdiction is an "insurmountable obstacle" to the sanctions award against petitioner. See also *Gomez* v. *Karavias U.S.A.*, 401 F. Supp. at 107 (dismissing London corporation as a party where there was no service of process except by service of summons and complaint on U.S. affiliate). This Court should therefore grant review to resolve the conflict between the Ninth and Seventh Circuits over the power of a district court to impose liability upon an entity over which the court has no *in personam* jurisdiction, and to ensure the lower courts' continued fidelity to *Zenith*.

III

Finally, the Ninth Circuit's dramatic expansion of the inherent powers doctrine warrants this Court's review because of its practical implications for virtually all public-interest organizations, their employees, and the individuals those organizations seek to serve. Obviously, the court of appeals' decision stands as precedent for imposing fee-shifting sanctions on *any* organization that provides counsel for third parties engaged in litigation. The potential financial liability to such organizations

could be enormous, as illustrated by the fee award in this case—$136,434.50 before any reductions occasioned by the court of appeals' decision.

As a matter of public policy, this newly created financial liability is significant, not so much for its direct effect upon public-interest organizations (though that is obviously important), but primarily because of two indirect effects: (1) the impact of this potential liability on the attorney-client relationship in litigation funded by such organizations, and (2) the effect of such liability on the ability and willingness of those organizations to fund public-interest litigation.

1. *Attorney-Client Relationship.* It has long been recognized that "[a]n attorney acts not only as a client's representative, but also as an officer of the court, and has a duty to serve both masters." *Business Guides*, 111 S. Ct. at 940 (Kennedy, J., dissenting); see also *Georgia* v. *McCollum*, 112 S. Ct. 2348, 2361-62 (1992) (discussing attorney's two duties); *McCoy* v. *Court of Appeals*, 486 U.S. 429, 447 (1988) (noting delicate balance struck between duty to client and duty to court owed by appointed counsel for indigents); *Polk County* v. *Dodson*, 454 U.S. 312, 318 (1981) (holding that by serving the court, appointed counsel does not become state actor). Most experienced attorneys have vivid and painful memories of situations in which those twin duties came into conflict.

The Ninth Circuit's decision, however, significantly complicates the already complicated three-way relationship among the attorney, the court and the client. Because any non-party organization financing litigation may now be sanctioned based on what occurs in the courtroom, such an organization now has an enormous incentive—if not a fiduciary obligation to its members—to take an active, direct role in the conduct of the litigation. Interference with the attorney-client relationship is almost unavoidable.

Indeed, by imposing liability for attorney behavior on the organizations funding the litigation, the courts below seem to be asking those outsiders to perform a traditional *judicial* function: policing the practice of law. See, *e.g.*, *Pavelic*, 493 U.S. at 126; *Roadway Express, Inc.* v. *Piper*, 447 U.S. at 766.

Ethical rules, however, generally prohibit just this kind of interference by anyone other than a judge. In California, for example, Rule 1-600 of California's Rules of Professional Conduct specifically prohibits interference with the attorney's professional judgment or independence. The rule also prohibits *participation* in an organization furnishing legal services if the organization interferes with the attorney-client relationship.

Thus, the Ninth Circuit's decision places attorneys and public interest organizations alike on the horns of a dilemma: Financial (and perhaps fiduciary) considerations *require* the public-interest organization to second-guess the attorney's professional judgments and thereby interfere with the attorney-client relationship. But ethical considerations require the attorney (who is often an employee of the organization) to spurn any such interference, and, in California at least, to resign from any organization that engages in such interference. Thus, the decision below not only places both the attorney and the organization in an impossible situation, but also disserves the client's interests.

The dilemma is exacerbated by the *extent* of supervision that would be required to avoid liability under the Ninth Circuit's decision. The sanctions it upheld were *not* imposed for such broad, strategic decisions as which theories of liability to press in a complaint or on appeal. Rather, as discussed above (*supra*, at 5-6), the court of appeals upheld sanctions for such alleged deficiencies as a failure to plead or prove that the plaintiffs and some of the defendants were "market participants," a failure to plead other claims with sufficient clarity or detail, and the filing of an ill-founded motion to strike. Obviously, peti-

tioner would have had to micro-manage the entire litigation to avoid liability.

2. *Public-Interest Litigation.* Besides undermining the attorney-client relationship, the dilemma created by the decision below will undoubtedly discourage a great deal of public interest litigation.

In the First Amendment context and elsewhere, this Court has long recognized the significant contribution public-interest organizations have made to the development of the law and to the public good. *E.g.*, *NAACP* v. *Button*, 371 U.S. 415, 431 (1962); *In re Primus*, 436 U.S. 412, 428 (1978). Indeed, absent financial and logistic support by such organizations, the cases leading to many of this Court's landmark rulings might never have been brought. *E.g.*, *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Swann* v. *Charlotte-Mecklenberg Bd. of Education*, 402 U.S. 1 (1971); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987).

The decision below will undoubtedly discourage such litigation in two ways. First, the mere prospect of financial liability will deter public interest organizations from supporting litigtation at all. Second, even when the *organization* decides to assist the parties in a particuar case, the pervasive interference in the attorney-client relationship required by the decision below will discourage competent attorneys from working on those cases.

What is most tragic about this state of affairs is that there is no good reason for such interference. As discussed above (*supra*, p. 10), a court can control its proceedings much more efficiently through its control over the litigants and attorneys actually appearing before it than through any control it might achieve over a nonparty organization that supports the litigation.

In sum, the decision below raises issues of overriding importance to courts, litigants, and the many organizations that fund public-interest litigation. This Court should grant review to ensure that the Ninth Circuit's decision receives the careful scrutiny it deserves.

CONCLUSION

For these reasons, petitioner urges this Court to grant this petition for writ of certiorari.

Respectfully submitted,

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March 16, 1993

Supreme Court, U.S.
FILED
MAR 16 1993
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92-1544

No. _____

In The

Supreme Court of the United States

October Term, 1992

PACIFIC LEGAL FOUNDATION,

Petitioner,

v.

PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LeMIEUX; JACK BOWEN McCLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,

Respondents.

Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW LOCKARY, et al., *Plaintiff,* v. PAUL KAYFETZ, et al.; VICTOR AMOROSO; MARY LOWRY; DIANA LOPEZ FRANSWORTH; FREDERICK B. McCLELLAN, et al.; PETER WARSHALL, et al., *Defendants-Appellees,* v. PACIFIC LEGAL FOUNDATION, *Appellant.*	No. 91-15384 D.C. No. CV-82-6191-SW OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer M. Williams, District Judge, Presiding

Argued and Submitted
May 13, 1992—San Francisco, California

Filed September 9, 1992

* Any typographical and/or incorrect punctuation found in the following Appendix pages were left intentionally to show accurately how the original documents appeared.

Before: Alfred T. Goodwin, Betty B. Fletcher and Thomas G. Nelson, Circuit Judges.

Opinion by Judge Fletcher

SUMMARY

Attorneys and Judges/Attorneys' Fees/Sanctions/Civil Litigation and Procedure/Attorneys and Judges

Affirming in part, reversing in part and remanding a district court judgment imposing sanctions against an entity directing the underlying litigation and "calling the shots," the court of appeals held that, while some of the conduct complained of was sanctionable and some was not, the district court properly relied on its inherent powers to sanction appellant as the responsible entity for the misconduct that was beyond the scope of Rule 11 and 28 U.S.C. § 1927.

Appellant Pacific Legal Foundation (PLF), itself, from time to time in similar litigation against the Bolinas Community Public Utility District has been a party, or held itself out as representing parties; this action was part of its ongoing effort to protect private property rights against "community no-growth policies." In this litigation, PLF sometimes held itself out as the representative of the plaintiffs, sometimes as the employer of the plaintiffs' lawyers, and always as the entity directing the litigation and "calling the shots." After the district court issued judgments in the underlying litigation for the defendants, the defendants sought sanctions against the plaintiffs, PLF and individual attorneys. A magistrate

was appointed who, ultimately, recommended the imposition of sanctions on PLF for several instances of misconduct. In his report, the magistrate set forth a calculation of the amount of the defendants' attorneys' fees that PLF should pay. The district court adopted the magistrate's recommendations. PLF argued that the district court erred in imposing sanctions against it rather than against the individual attorneys who signed the offending pleadings and other papers, the sanctions violated its and "its clients' " first amendment rights, they were imposed for conduct that was not sanctionable, and the district court erred in calculating the amount of sanctions.

[1] The court found no merit in PLF's argument that the district court erred in sanctioning it, rather than the individual attorneys who signed the pleadings or other papers the court found sanctionable. [2] While the district court recognized that neither Fed. R. of Civ. P. 11 or 28 U.S.C. § 1927 gave it the power to sanction PLF, [3] that court properly concluded that it could rely on its inherent powers to sanction such of PLF's misconduct that was beyond the scope of Rule 11 and § 1927. [4] The district court properly found that PLF was responsible for the sanctionable conduct. PLF was not a mere passive and abstract institutional backdrop, but was, rather, the sponsor of the litigation, and was actively involved in all phases of the case. The named plaintiffs gained nothing. [5] In addition, the court rejected PLF's first amendment claim. PLF cited no cases in which the imposition of sanctions on counsel has been held to violate the right to litigate controversial issues and vindicate clients' legal rights. [6] While the court has recognized the reservation of sanctions for the rare and exceptional case where the

action is clearly frivolous because of the potentially chilling effect on innovative lawyering, even in such rare cases the court will sanction misconduct even where the responsible party claims noble motives. [7] However, because the court could not conclude that PLF's motion for *Pullman* abstention was legally frivolous in its inception, it was difficult to justify sanctions for a strategy designed to push the district court along to a ruling. Thus, the court found that the district court erred in imposing sanctions for this motion. [8] Similarly, the court reversed the imposition of sanctions on PLF for the plaintiffs' procedural due process claim because the litigation of this claim was a legitimate effort to modify existing law. [9] In addition, the imposition of sanctions for plaintiffs' failure to comply with the district court's order requiring a more specific pleading was not an abuse of discretion, [10] nor was it so for sanctioning PLF for filing the antitrust claims.

[11] The court also held that the method used by the magistrate in calculating the amount of sanctions met the requirements established for quantifying sanction awards, and the district court did not abuse its discretion in adopting the magistrate's method of calculation. [12] However, without proper documentation, the magistrate should not have included in his determination an amount for "second chair counsel" in the sanctions award. [13] The district court also erred in including the defendants' attorneys' fees for preparing their motion for sanctions in the sanctions it imposed. [14] However, the district court properly awarded fees for the defendants' attorneys' participation in settlement conferences, and

discovery proceedings, although there was no finding of sanctionable conduct in any of these proceedings.

COUNSEL

Anthony T. Caso, Pacific Legal Foundation, Sacramento, California, for the appellant.

Richard E.V. Harris, Orrick, Herrington & Sutcliffe, San Francisco, California, for the defendants-appellees.

OPINION

FLETCHER, Circuit Judge:

Pacific Legal Foundation ("PLF") appeals sanctions imposed on it by the district court for its conduct while "representing" owners of undeveloped land in Bolinas, California in their suit against the Bolinas Community Public Utility District. PLF argues that the court erred in imposing sanctions against it rather than against the individual attorneys who signed the offending pleadings and other papers, that the sanctions violated its and "its clients' " First Amendment rights, that sanctions were imposed for conduct that was not sanctionable, and that the court erred in calculating the amount of sanctions. We affirm in part, reverse in part and remand.

FACTS

Bolinas is a small community in northern California. In 1982, as the nominal plaintiffs, owners of undeveloped

land in Bolinas filed suit against the Bolinas Community Public Utility District ("BCPUD"), against present and former BCPUD directors and against private individuals. The focus of the suit was a moratorium on water hookups BCPUD originally imposed in 1971 and essentially reenacted in 1973 and 1977; the thrust of the plaintiffs' claims was that the defendants had prevented them from developing their land. The plaintiffs alleged regulatory takings, substantive and procedural due process violations and equal protection violations and they also made antitrust claims. They sought damages of $30 million ($10 million trebled under the Sherman Act), and declaratory and injunctive relief. PLF, a nonprofit corporation, contacted and organized the plaintiffs and paid for the litigation. PLF, itself, from time to time in similar litigation has been a party, or has held itself out as representing parties; this suit was part of its ongoing effort to protect private property rights against "community no-growth policies". In this litigation, PLF sometimes has held itself out as the representative of the plaintiffs, sometimes as the employer of the plaintiffs' lawyers, and always as the entity directing the litigation and "calling the shots."

The case has been lengthy and stormy. In 1984, the district court granted BCPUD's motion to dismiss as to certain claims and defendants. *See Lockary v. Kayfetz*, 587 F. Supp. 631 (N.D. Cal. 1984) (*Lockary I*). In 1987, it granted summary judgment in favor of the defendants on all remaining claims. The district court's grant of summary judgment was affirmed in part and reversed in part by this court. *See Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir.

1990) (*Lockary II*). In May 1991, at plaintiffs' request, their remaining claims were dismissed with prejudice.

After the district court ruled in their favor on the summary judgment motion, the defendants sought sanctions against the plaintiffs, PLF and individual attorneys. The district court, with the agreement of the parties, appointed a magistrate as special master and referred the sanctions issued to him. The magistrate initially filed a draft report, and sought comment from the parties. After receiving the parties' responses, the magistrate filed a final report, which the district court adopted in full in an April 2, 1990 order.

The magistrate did not recommend that sanctions be imposed on the plaintiffs themselves. After extensive discussion of all the plaintiffs' claims and several specific motions, he ultimately recommended imposition of sanctions on PLF for seven instances of misconduct.

At the conclusion of his report, the magistrate recommended that the court hold further hearings to determine whether individual attorneys employed by PLF should be sanctioned. However, the magistrate later recommended that such proceedings not go forward. He was concerned about the due process rights of the attorneys. Although his findings regarding PLF strongly suggested the attorneys were culpable, they had had no opportunity to respond in their individual behalfs at that stage of the sanctions proceedings. He also feared that it might appear that he could not be impartial in subsequent proceedings. In an order dated October 24, 1990, the district court adopted the recommendation "that all sanctions proceedings against individual attorneys be terminated

immediately and permanently." The defendants have not appealed this order.

The magistrate also prepared a second report on the "character and magnitude" of sanctions, in which he set forth a calculation of the amount of the defendants' attorneys' fees that PLF should pay. The district court adopted this report as well. In an order dated February 7, 1991, it imposed sanctions on PLF in the amount of $136,434.50.

The order dismissing plaintiffs' claims stated that the court's prior orders as to sanctions would remain in effect.

STANDARD OF REVIEW

"[A]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2461 (1990).

DISCUSSION

I. Imposition of Sanctions on PLF as an Entity

[1] PLF argues that the district court erred in sanctioning it, rather than the individual attorneys who

signed the pleadings or other papers the court found sanctionable. We find no merit in this contention.[1]

[2] The district court imposed sanctions on PLF, the entity which had controlled the litigation of the Bolinas suit and was, in the court's view, responsible for the substantial abuse of the court system. The court recognized that neither Federal Rule of Civil Procedure 11 or 28 U.S.C. § 1927 gave it the power to sanction PLF. Rule 11 provides for sanction against the individual attorney or party or agent of a party who *signs* an abusive pleading or motion. Fed. R. Civ. P. 11; *Pavelic & LeFlore v. Marvel Entertainment Group*, 110 S.Ct. 456, 458 (1989). Section 1927 is limited to attorney misconduct: it allows the court to sanction "any attorney . . . who . . . multiplies the proceedings in any case unreasonably and vexatiously."

[3] The district court concluded, however, that it could rely on its inherent powers to sanction PLF as the responsible entity. We agree. In a recent decision that came down not long after *Pavelic*, the Supreme Court explained that a court may use its inherent power to reach misconduct that is beyond the scope of Rule 11 and Section 1927:

> There is . . . nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent

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[1] Although we might find that individual counsel were sanctionable and even that they should have been sanctioned, that issue is not before us. The fact that individual attorneys were not sanctioned does not preclude sanctions against PLF.

> power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees. . . . Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the rules, the court ordinarily should rely on the rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the rules are up to the task, the court may safely rely on its inherent power.

Chambers v. Nasco, Inc., 111 S.Ct. 2123, 2135-36 (1991) (citation omitted). In *Chambers*, the district court was confronted by a party to the lawsuit who had acted fraudulently "outside the confines of the courtroom" to deprive the court of jurisdiction, had filed false and frivolous pleadings whose true nature could not be known until after the trial on the merits, and had engaged in "tactics of delay, oppression, harassment and massive expense to reduce [the opposing party] to exhausted compliance." *Id.* at 2131 (quoting *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120, 138 (W.D. La. 1989)). This misconduct was largely outside the scope of Rule 11 and entirely outside Section 1927 because Chambers was a party, not an attorney, and most of his bad acts took place outside the strict confines of the case and the

courtroom. The district court relied on its inherent powers to sanction these " 'acts which degrade the judicial system.' " *Chambers*, 110 S.Ct. at 2131 (quoting *Nasco*, 124 F.R.D. at 139). The Supreme Court found "no abuse of discretion in resorting to the inherent powers in the circumstances of this case." *Chambers*, 111 S.Ct. at 2136. We reach the same conclusion here. To use the language of *Chambers*, in the "informed discretion" of the district court, Rule 11 and Section 1927 were not "up to the task" of sanctioning PLF's misconduct. The district court thus properly imposed sanctions pursuant to its inherent power.

PLF argues that *Pavelic* limits the court's inherent powers, as well as its powers under Rule 11. However, much as the *Pavelic* court extolled the virtues of punishing the *signer*, the Court made quite clear that the foundation of its decision was the "plain meaning" of the "specific text" of Rule 11. 110 S.Ct. at 458. The Court's policy concerns were expressed in the context peculiar to Rule 11: "the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility." *Id.* at 460. *Chambers*, which came after *Pavelic*, makes clear that there are situations where exercise of the court's inherent powers is appropriate and needed. Thus, *Pavelic* is not as broad as PLF suggests.[2]

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[2] PLF cites dicta from the Fourth Circuit decision in *Blue v. United States Dept. of Army*, 914 F.2d 525 (4th Cir. 1990). In *Blue*, the Fourth Circuit opined that after *Pavelic*, it is "doubtful that [sanctions theories other than Rule 11] will support sanctions against an entire firm rather than against the individual lawyers who acted improperly". 914 F.2d at 549. However, this opinion is inapposite here: at issue is not the court's effort to sanction a

[4] PLF also takes issue with the district court's factual finding that it was responsible for the sanctionable conduct. PLF contends that it merely provided logistical support to the individual attorneys who represented the plaintiffs, and did not participate as an entity in any way in this suit. The record belies this assertion. While the PLF attorneys did not identify themselves as PLF employees in the signature block of the motions and pleadings, the heading of each court paper they filed listed the attorneys' names, followed by the name and address of PLF. Moreover, the plaintiffs were represented by a constantly changing cast of PLF attorneys, including PLF's president. PLF funded the litigation in its entirety. In its analysis of PLF's involvement, the district court relied on statements by PLF's president vaunting the importance of the Bolinas suit for PLF, and placing the case in the context of other, similar suits by PLF. The district court found that PLF was not "a mere passive and abstract institutional backdrop", but was, rather, "the sponsor of this litigation, and was actively involved in all phases of the case." We agree.

As our discussion below of the sanctioned conduct suggests, the course of the litigation makes clear that in this case the nominal plaintiffs' interests ran a far distant second to PLF's own goals. The claims raised, particularly the antitrust claims and the "Mesa Ranch" claims, bear little relationship to the nominal plaintiffs' economic or

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law firm rather than individual attorneys, but the court's use of its inherent powers to reach the entity truly responsible for abuse of the legal system. As PLF has repeatedly asserted, and we agree, it is not a law firm.

other concerns. PLF contends that it merely furnished counsel to the plaintiffs "who could not otherwise afford to present their claims in court." *Appellants' Opening Brief* at 4. It acknowledges, however, that as a foundation it seeks "to participate in precedent setting litigation in the public interest." *Appellants' Reply Brief* at 3. The course of this litigation suggests PLF's goal was to establish a legal precedent, and that the nominal plaintiffs were merely pawns or puppets in this effort. Tellingly, once this court reversed in part the district court's grant of summary judgment against PLF's "clients", thereby setting in the appellate court opinion the kind of precedent PLF sought, the nominal plaintiffs petitioned the district court to dismiss the suit with prejudice. While the original complaint sought substantial monetary and injunctive relief for the named plaintiffs, alleging great harm to their economic interests, suddenly, when the road to recovery was reopened, the case was abandoned. The named plaintiffs gained nothing.

The record strongly supports the district court's finding that PLF itself was directly responsible for the sanctioned misconduct. The district court did not abuse its discretion in sanctioning PLF.

II. First Amendment Violation

PLF argues that imposition of sanctions on it violated it and its clients rights to "litigate issues of constitutional dimension."

[5] PLF cites no cases in which the imposition of sanctions on counsel has been held to violate the right to litigate controversial issues and vindicate clients' legal

rights. It relies primarily on *National Association for the Advancement of Colored People v. Alabama*, 377 U.S. 288 (1964) and *In re Primus*, 436 U.S. 412 (1978). In the former, the Supreme Court held that the state of Alabama could not use its laws governing the right of an out of state corporation to do business in the state to prevent the NAACP from conducting its activities in Alabama. In the latter, the Court held that South Carolina Supreme Court Disciplinary Board could not use a rule regulating attorney solicitation to prevent the ACLU from sending a letter to a prospective litigant. These cases recognize that public interest advocacy organizations enjoy protected rights to solicit clients and otherwise promote their legal activism. However, neither case supports PLF's position that abuse of the court system is constitutionally protected when a public interest law organization is the perpetrator.

[6] We have recognized that, because of the potentially chilling effect on innovating lawyering, "we reserve sanctions for the rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose." *Operating Engineers Pension Trust v. A-C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988). However, in such rare cases, we will sanction misconduct even where the responsible party claims noble motives. We agree with the eleventh Circuit that "[s]tatus as a public interest law firm or the nature of a claim does not confer immunity from attorneys' fees for bringing and maintaining frivolous lawsuits." *Avirgan v. Hull*, 932 F.2d 1572, 1582-83 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 913 (1992).

III. Sanctionable Conduct

The district court reviewed PLF's claims and motions in detail. It ultimately decided to sanction only a few instances of conduct. PLF argues that sanctions were improper in each instance.

A. The Abstention Motion

The district court imposed sanctions on PLF for filing a frivolous motion for *Pullman* abstention. *See Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) (federal district court should abstain from exercising jurisdiction when a federal constitutional issue might be mooted or altered by a state court resolution of a pertinent state law issue).

In 1983, defendant County of Marin (not a party to this appeal) requested the district court to abstain. PLF opposed that motion; one of its arguments was that the plaintiffs' claims "do not turn on any sensitive social policy recognized by law."

In 1985, PLF itself moved for the court to abstain. It contended that the Supreme Court's then-recent decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) required the district court to abstain, because under *Williamson County*, a Fifth Amendment takings claim was not ripe until the property owner has exhausted procedures the state provides for compensation. *See* 473 U.S. at 195. The California Supreme Court had previously held that no state compensation was available for regulatory takings, *Agins v. City of Tiburon*, 598 P.2d 25, 29-31 (Cal. 1979), *aff'd*

on other grounds, 447 U.S. 255 (1980), but PLF argued that it was unclear whether *Agins* would extend to the kind of regulatory action present in the plaintiffs' case. PLF also argued at this time that the issues in its case "have been 'repeatedly noted' to be a sensitive issue of social policy."

The district court did not rule on the abstention motion immediately. PLF renewed the motion in 1987. At that time, it argued in addition that the Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), which expressed explicit disapproval of *Agins*, also supported abstention because it further muddied state law. In truth, however, *First English* did not affect the plaintiffs' claims because *Williamson County* required recourse only to compensation procedures available "at the time of taking". *Williamson County*, 473 U.S. at 194. PLF also offered to dismiss certain claims and defendants to "faciliate" dismissal, although it made dismissal contingent on the grant of abstention. At this time, the court denied the motion and granted summary judgment in favor of the defendants.

[7] The appropriateness of sanctions for this motion is a close question. The substance of the *Williamson County* decision and its timing support PLF's argument that it moved for abstention in 1985 in response to a change in the substantive law, although Agins undercuts this argument. However, the district court may have been influenced in its decision to sanction by PLF's conduct in renewing the motion for abstention in 1987. There, PLF's motivations in renewing at that time indeed seem suspect: the motion was renewed in the face of the district

court's imminently expected ruling on the summary judgment motions before it. Furthermore, PLF's contingent offer to dismiss some claims and some of the defendants seems a disingenuous effort to keep some of the case alive while sacrificing part of it. However, this games playing cannot justify sanctioning the original filing of the motion. Because we cannot conclude that the motion for *Pullman* abstention was legally frivolous in its inception, it is difficult to justify sanctions for a strategy designed to push the district court along to a ruling. Accordingly, we find that the district court erred in imposing sanctions for this motion.

B. The Procedural Due Process Claim

The plaintiffs claimed that BCPUD and certain individual defendants had violated their right to procedural due process by failing to provide them with individual notice of the decisions to impose and reimpose the moratorium, and of various administrative decisions regarding water permits requested by individuals. They also argued that the BCPUD, whose members used water supplied by the district, could not be neutral decisionmakers in ruling on new applications for water use. The district court found that the "entire procedural due process claim [was] legally frivolous, unreasonable, and pursued in bad faith." It concluded that the claim was "frivolous under existing due process law, and was not a good faith attempt to extend or modify that law."

On appeal, we affirmed summary judgment in favor of the defendants on the notice issues, holding that under California law the plaintiffs had no property interest in

water they had not yet received, and thus were not entitled to notice. *Lockary II*, 917 F.2d at 1156.

PLF argues its procedural due process claims were based on good faith effort to extend existing law. In *Bi-Metallic Investment Company v. State Board of Equalization*, 239 U.S. 441, 445 (1915), the Supreme Court held that when the government imposes a "rule of conduct [that] applies to more than a few people" or "general statute," individualized notice to potentially affected parties is not necessary. The Court distinguished its earlier decision in *Londoner v. Denver*, 210 U.S. 373 (1908), in which it had held that when "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds," those persons were entitled to a hearing. *Bi-Metallic*, 239 U.S. at 446.

PLF argues that it was seeking an exception to the *Bi-Metallic* rule, in reliance on *Frontier Airlines, Inc. v. Civil Aeronautics Bd.*, 349 F.2d 587 (10th Cir. 1965). That case involved the applications of competing airlines for the right to service certain airports. The Tenth Circuit held that when the Civil Aeronautics Board held hearings on service, it was required to consider Frontier's previous applications to provide them. It held that the Board was required to "consolidate for hearing all applications that are competing and mutually exclusive in nature," because when one application was heard and granted, all competing applications were "effectively denie[d], without a hearing." 349 F.2d at 590. PLF suggests that all Bolinas residents were "competitors" for the same scarce resource. The limited number of owners of undeveloped property who sought water hookups were thus entitled to notice of any administrative proceedings regarding water

allocation, because any grant of a permit necessarily affected their chance of getting a hookup. PLF also suggests the plaintiffs' case was closer to *Londoner*, the case distinguished in *Bi-Metallic*, than to *Bi-Metallic* itself.

We agree that PLF's litigation of this claim was a legitimate effort to modify the law. A more recent decision by this court suggests that PLF correctly anticipated that courts may create fact-specific exceptions to the *Bi-Metallic* rule. In *Harris v. County of Riverside*, 904 F.2d 497 (9th Cir. 1990), we held that the county deprived Harris of due process when it rezoned his property in such a way as to put him out of business. The zoning change at issue affected only two land-owners (Harris, and the owner of land immediately adjacent to his), and was imposed after a local developer and a city councilman wrote the county board of supervisors requesting a zoning change to eliminate Harris' motorcycle park. Rejecting the county's proposed distinction between a "legislative" action (not requiring procedural due process) and an "adjudicatory or administrative" action (requiring procedural due process), we observed that "the character of the action, rather than its label, determines whether those affected by it are entitled to constitutional due process." 904 F.2d at 501-02.

[8] Admittedly, one aspect of PLF's litigation of this issue is particularly troubling: PLF made this claim on behalf of some plaintiffs who under no stretch of the imagination could have been entitled to notice of the 1977 reenactment of the moratorium, because they did not own property in Bolinas at that time. In addition, PLF's litigation tactics were at times extremely aggressive; for example, it gratuitously insinuated that the defendants

actively attempted to keep two of the plaintiffs from getting a water hookup under a "grandfather clause": "Failure to give affected property owners or at least those with applications on file notice that the rules had been changed and later repealed strongly suggests that defendants were intentionally avoiding those such as the Gilberts to deprive them of the opportunity to exercise their rights. . . . " *Opposition to Defendant's Motion for Summary Judgment* at 7. However, the district court imposed sanctions because it found PLF's legal position was frivolous and taken in bad faith. We cannot agree. We thus reverse the district court's imposition of sanctions for the assertion of this claim.

C. Failure to Comply with the Court's Order Requiring More Specific Pleading

After the plaintiffs filed their initial complaint, the district court, in response to motions by the defendants, ordered the plaintiffs to submit an amended complaint. It specifically ordered them to "plead with specificity facts which indicate a nexus between each defendant and the alleged wrongs suffered." The plaintiffs filed an amended complaint, and the defendants again moved to dismiss. In ruling on the defendants' motions to dismiss, the district court criticized PLF strongly, finding the amended complaint "added virtually no specificity." It found this lack of specificity was "fatal to some of [the plaintiffs'] claims against some defendants" and dismissed those claims.

The district court later imposed sanctions on PLF because the amended complaint did not comply with its earlier order, but rather "simply recycled the conclusory

allegations of the amended complaint." It found that "counsel for plaintiffs acted unreasonably and in bad faith when, despite Judge Williams' clear order, they refused to set forth in the amended complaint the specific acts by the individual defendants that allegedly offended the constitutional and statutory norms relied on by plaintiffs."

[9] The district court did not impose sanctions because it found PLF had merely engaged in inept or sloppy lawyering. A court may impose sanctions pursuant to its inherent powers only when it finds the action in question was taken in bad faith. *Chambers,* 111 S. Ct. at 2135-36. The district court's comments on the amended complaint make clear that PLF failed to comply with district court's direct and specific instructions. In imposing sanctions, the court found that PLF's "refusal to comply" was "unreasonabl[e] and in bad faith." Sanctions for this conduct were thus not an abuse of discretion.

D. The Antitrust Claims

The district court sanctioned PLF for bringing "factually frivolous" antitrust claims against BCPUD and two of its directors, Paul Kayfetz, and Doris Lemieux. Apparently, the plaintiffs' theory was that the defendants engaged in a conspiracy to restrain or monopolize the market in tourist accommodations. The antitrust claims were dismissed early in the case. The district court held that under *Parker v. Brown,* 317 U.S. 341 (1943), BCPUD was not subject to Sherman Act liability, and that the individual defendants were shielded by the

Noerr-Pennington doctrine. *See United Mine Workers v. Pennington*, 381 U.S. 657 (1964); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

The district court concluded that PLF's "fundamental failure" to produce any evidence supporting its theories, "in combination with PLF's failure to point to a cognizable property interest of the individual plaintiffs in the relevant markets" showed that PLF "prosecuted these particular anti-trust claims in bad faith." It noted that PLF repeatedly characterized the individual plaintiffs, the Lockarys, Gilberts and Mr. Macey, as seeking only to construct single-family homes for their own use on their property; these statements suggested strongly that the plaintiffs had no interest in the tourist market they alleged the defendants sought to restrict. The court also pointed to the absence of evidence supporting the plaintiffs' theory of a conspiracy to monopolize, and to PLF's contradictory statements regarding the defendants' actions. It concluded, "While the undersigned gives PLF the benefit of reasonable doubt in the context of a sanctions action, this factual support is simply far too thin to conclude that PLF could have believed that its clients ever had the makings of a meritorious case on the anti-trust claims involving the tourist accommodation and property development markets."

[10] PLF contends that the district court could not require it to develop evidence on a claim that was laid to rest early in the litigation; it also contends that there was legal foundation for this claim. PLF distorts the district court's position. The court found that the absence of evidentiary support, the statements regarding the individual plaintiffs and PLF's weak efforts to suggest how it

might have constructed its case, indicated that the antitrust claims were brought in bad faith and known to be bogus from the beginning. PLF seeks to justify after the fact the bringing of a cause of action the magistrate found was in bad faith from the very beginning of the case. In view of the weakness of these justifications, and of the detailed factual findings of the district court on PLF's handling of these claims, we find it was not an abuse of discretion to sanction PLF for filing the antitrust claims.

E. The Mesa Ranch Claims

The plaintiffs included among their numbers Mesa Ranch, a limited partnership, and its general partner, Anton Holter. One acre of Mesa Ranch, a 210 acre property, lies within the Bolinas water district. In their inverse condemnation claim, these plaintiffs alleged that BCPUD and its directors had publicized an intent to condemn the Mesa Ranch property to depress its value, in order that it could be acquired more cheaply. The plaintiffs also alleged regulatory taking and substantive due process violations.

The district court imposed sanctions on PLF not because it found the claim legally frivolous, but because it found "subjective bad faith" in PLF's "presentation" of the claim. It found that PLF deliberately avoided specifying its theories underlying the claims, and identified several contradictory statements in papers related to these claims. It concluded that "PLF conveniently shifted ground when it was faced with adverse facts or legal doctrine," and that "[t]he protean nature of the Mesa Ranch inverse condemnation cause of action needlessly

and unreasonably multiplied and confused the proceedings."

PLF suggests that the sole basis for the "massive sanctions" on this issue was the district court's finding that it "shifted the grounds of its claim during this litigation." It also argues that the district court found it contradicted itself as to the defendants' motives for their actions, while motive is not an element of an inverse condemnation claim under *Klopping v. City of Whittier*, 500 P.2d 1345 (1972). However, the district court's findings go beyond this. It found that PLF shifted its allegations to suit its purposes, in such a way as to make it more difficult for the district court to address the claims and more costly for the defendants to respond to them. While PLF suggests that there were few papers filed with respect to these claims and thus few opportunities to "shift" claims, it seems significant that several of the contradictory allegations came in papers filed in opposition to the defendants efforts' to get rid of the claims, on motions for summary judgment or motions to dismiss. The district court concluded that "the obfuscatory and inconsistent manner in which PLF presented this claim throughout the course of this litigation was deliberate, not merely a product of sloppy lawyering." Imposition of sanctions for PLF's continual effort to "move the target" was not an abuse of discretion.

F. The Motion to Strike

Early in the litigation, several defendants filed motions to strike or dismiss certain claims. PLF filed a counter motion to strike some of these motions. With

regard to three of the motions, it contended that the defendants had improperly submitted affidavits and other supporting materials. It contended that another defendant's motion was late. In support of its motion to strike defendant BCPUD's motion, it argued BCPUD had failed properly to move the court for relief because it had not filed a *motion* to strike, but only a notice of motion and a supporting memorandum. The district court found that this final claim for relief was asserted "in bad faith and unreasonably and vexatiously multiplied the proceedings."

In the past, we have held that "if there is a colorable claim to a particular type of relief on a given set of facts and the signer relies on an unsupportable legal theory to bolster his claim when a supportable one exists as well, the singer cannot be sanctioned under Rule 11." *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990) (en banc). Here, however, PLF raised only one argument in support of its claims for relief against BCPUD, and the district court found PLF took this position in bad faith. While the court did not find PLF's other claims in the same motion to be sanctionable, those sound claims cannot shield this improper one. We thus hold that the district court's sanctioning of this act of gratuitous overlitigation was not an abuse of discretion.

IV. Amount of Sanctions

PLF challenges several aspects of the magistrate's calculation of the amount of sanctions. It finds error in several specific calculations, in the award of attorneys'

fees for the defendants' preparation of the sanctions motion, and in the magistrate's method of calculation.

A. Method of Calculation

PLF argues that the district court erred in its method of calculating the amount of sanctions. It contends that the magistrate "proceeded without any evidence in formulating the amount of the attorneys' fees to be awarded." *Appellants' Opening Brief* at 47.

This court has required that "a sanctions award be quantifiable with some precision and properly itemized in terms of the perceived misconduct and the sanctioning authority." *In re Yagman*, 796 F.2d 1165, 1184 (9th Cir.), *amended*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 434 U.S. 963 (1987). "When the sanctions award is based upon attorney's fees and related expenses, an essential part of determining the reasonableness of the award is inquiring into the reasonableness of the claimed fees. . . . [T]he court must make some evaluation of the fee breakdown submitted by counsel." 796 F.2d at 1184-85.

[11] The district court has set out in detail the calculations used to determine the amount of attorneys' fees awarded as sanctions. The magistrate took the time sheets and other materials the defendants' attorneys submitted as his point of departure. Because PLF generally addressed more than one claim in each of its papers, and the time sheets submitted by the defendants' attorneys did not break down the time spent answering a motion into the individual claims addressed in it, the magistrate concluded he was required to apportion the listed figures to arrive at the time spent on the frivolous claims or

motions. This necessarily involved some estimation. In apportioning time, the magistrate attempted to take into consideration the rule the particular attorney played in the legal action at issue and the complexity of the tasks she faced. The magistrate emphasized that he attempted to be conservative in his estimates. The magistrate thus made careful calculations on the basis of the voluminous records submitted to him. We find this method meets the requirements we have set for quantifying sanctions awards.

[12] However, two items included in the magistrate's calculations are problematic. First, the magistrate included an amount for "second chair counsel" in each sanctions award. He reasoned that, "given the complexity and time demands of a case like this, it was reasonable for each law firm that represented one or more defendants to have a second lawyer keep up sufficiently with the case so that he or she was in a position to help meet deadlines, cover appearances, or handle communications with other counsel or clients when the lead attorney was not available." This part of the award is not based on the submitted timesheets and is highly speculative. A law firm would generally pass the billable costs of this "second chair" to its clients, and such costs would appear in some form in its timesheets. Without documentation, the magistrate should not have included this item.

Additionally, the magistrate included in his apportionment a figure to account for "work not directly reflected in or inferable from papers docketed in the court's file," such as time to interview and confer with clients, analyze documents, formulate strategies, and confer and coordinate with co-counsel. Again, we find that

inclusion of this additional time, which was in no way supported by documentation, was improper.

With the exception of including these two items the district court did not abuse its discretion in adopting the magistrate's method of calculation.

B. Fees for Defendants' Pursuit of Sanctions

PLF argues that the district court erred in including the defendants' costs of preparing and supporting their motion for sanctions in the amount of sanctions it awarded.

We have not yet ruled on this question, and directly applicable authority from other courts is scant. In a case involving Rule 11 sanctions, the Fourth Circuit has held that costs of preparation of a sanctions motion cannot be included in the sanctions. *Introcaso v. Cunningham,* 857 F.2d 965, 970 (4th Cir. 1988). However, in a case involving Rule 37(c) sanctions for discovery abuse, the Eighth Circuit has held that the sanctions can include the costs of seeking sanctions. *Booker v. Stauffer Seeds, Inc.* (*In re Stauffer Seeds, Inc.*), 817 F.2d 47, 50 (8th Cir. 1987). Lower courts have also taken differing positions. *Compare, e.g., Nasco, Inc. v. Calcasieu Television and Radio,* 124 F.R.D. 120, 143 (W.D. La. 1989) (costs of bringing sanctions motion included in sanctions), *aff'd,* 984 F.2d 696 (5th Cir. 1990, *aff'd,* 111 S.Ct. 2123 (1991); *Blossom v. Blackhawk Datsun, Inc.,* 120 F.R.D. 91, 102 (Rule 11 sanction award including costs of pursuit of sanctions) (S.D. Ind. 1988) *with Unanue Casal v. Unanue Casal,* 132 F.R.D. 146, 151-52 (D.N.J. 1989) (declining to award

attorneys' fees for bringing sanctions motion), *aff'd*, 898 F.2d 839 (1st Cir. 1990).

The Supreme Court's recent decision in *Cooter & Gell v. Hartmarx Corp.* fortunately provides some guidance on this issue. The Court held that the party who sought sanctions under Rule 11 was not entitled to reimbursement for the costs of defending an award of sanctions on appeal. The Court rejected the argument that such costs were incurred "because of" the sanctioned party's filing of the offending pleading. The court refused to adopt the position of the party seeking sanctions that "[it] would have incurred none of [its] appellate expenses had petitioner's lawsuit not been filed." *Cooter & Gell*, 110 S.Ct. at 2461. The court found that "[t]his line of reasoning would lead to the conclusion that expenses incurred "because of" a baseless filing extend indefinitely. The court reasoned:

> We believe Rule 11 is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level. A plaintiff's filing requires the defendant to take the necessary steps to defend against the suit in district court; if the filing was baseless, attorneys' fees incurred in that defense were triggered by the Rule 11 violation. If the district court imposes Rule 11 sanctions on the plaintiff, and the plaintiff appeals, the expenses incurred in defending the award on appeal are directly caused by the district court's sanction and the appeal of that sanction, not by the plaintiff's initial filing in district court.

Id. at 2447.

[13] *Cooter & Gell* suggests that the trial court should limit sanctions to the opposing party's more "direct" costs, that is, the costs of opposing the offending pleading or motion. We thus find that the district court erred in including the defendants' attorneys' fees for preparing their motion for sanctions in the sanctions it imposed.

C. Specific Errors

PLF argues that "the court below erred by awarding fees for conduct that was not found to be sanctionable." It cites four specific examples.

PLF argues that the court awarded fees for defendants' opposition to a motion to intervene, that, according to it, "was completely unrelated to any conduct on the part of the plaintiffs." *Appellants' Opening Brief* at 45. The magistrate allowed reimbursement of 20% (a "modest percentage") of the defendants' attorneys' time spent on this, on the theory that "but for PLF's pursuit of this action, of which, at this juncture, vis-a-vis BCPUD, some 20% was devoted to sanctionable claims, there would have been no action in which Morganstein could have tried to intervene; moreover, one of the substantive predicates for his complaint in intervention tracked in essence the sanctionable procedural due process claims that PLF continued to press." We agree that inclusion of this item constituted an abuse of discretion: although Morganstein's intervention "piggybacked" on the action it had filed, PLF was not responsible for his decision to seek intervention or for the claims he chose to make.

The defendants' attorneys indicated they spent two hours researching and drafting their opposition to the plaintiffs' motion to strike. The district court found 100% of this time to be reimbursable. PLF is correct in its argument that because only one paragraph of this motion was found to be sanctionable, the district court should have apportioned the time.

PLF argues that the district court erred in awarding fees for the defendants' response to the original complaint although, in his report on sanctions, the magistrate refers only to the amended complaint. However, while the magistrate cites only to the amended complaint, the original complaint also included the claims the district court found to be frivolous or in bad faith. Thus, the district court did not err in ordering PLF to pay a portion of the defendants' attorneys' fees for responding to it.

[14] Finally, PLF also contends the district court erred in awarding fees for the defendants' attorneys' participation in "settlement conferences and . . . discovery proceedings" although "there was no finding of sanctionable conduct in any of these proceedings." *Appellants' Opening Brief* at 45. PLF cites to a page in the magistrate's report which does not mention a "settlement conference," but does refer to a "status conference." The district court awarded reimbursement of 20% of the defendants' attorneys' fees for this activity. This was not an abuse of discretion: the conference necessarily involved discussion of the claims the court found to be in bad faith.

CONCLUSION

We affirm the district court's decision to sanction PLF. However, we find the district court erred in imposing sanctions for the procedural due process claim and the abstention motion. The elimination of these items will necessitate a recalculation of the dollar amount of the sanctions. We have also identified other errors in the calculation of the amount of sanctions. We remand to the district court for recalculation of the sanctions award in accord with this decision. The parties shall bear their own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, et al., Plaintiffs, v. PAUL KAYFETZ, et al., Defendants.	C-82-6191 (SW) ORDER ADOPTING FINDINGS OF MAGISTRATE BRAZIL *NUNC PRO TUNC* APRIL 2, 1990 (Filed Jan. 14, 1991)

Although I originally signed this order April 2, 1990, the court records indicate that the order was not filed. Therefore, this order *nunc pro tunc* April 2, 1990, shall serve as the official record.

I have carefully reviewed the Report and Recommendations by Magistrate Brazil acting as Special Master and filed on January 11, 1990, with respect to the liability of plaintiffs' attorneys for sanctions. I have also read and considered the comments on that Report submitted by the parties. I HEREBY ADOPT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ACCEPT THE RECOMMENDATIONS CONTAINED THE REPORT BY MAGISTRATE BRAZIL. I find that the circumstances of this case clearly support the imposition of substantial monetary sanctions on the Pacific Legal Foundation. In addition, the Magistrate's findings of fact and conclusions of law clearly justify his issuing an order requiring attorneys Darlene Ruiz, Ronald Zumbrun, Harold

Hughes, Orrin Finch, and Robert Best, to show cause why they should not be sanctioned in their individual capacities. However, I concur with the comment made by Pacific Legal Foundation in the objection filed January 29, 1990, that Ms. Ruiz may not be held liable for attorneys' fees under Rule 11 for signing the Motion to Strike referred to on page 100 of the Report, because that motion had been signed several months before the effective date of amended Rule 11, and an award of attorneys' fees not provided for the old Rule 11.

I hereby ORDER Magistrate Brazil to commence further proceedings on the issue of the amount of the sanctions to be imposed on the Pacific Legal Foundation, and on the issue of the liability for the sanctions of the individual attorneys noted in the Report. If the Magistrate concludes that any attorney or attorneys should be sanctioned in their individual capacities, he should also make findings and recommendations with respect to the nature and degree of those sanctions.

IT IS SO ORDERED.

DATED: 1/14/91 /s/ Spencer Williams
UNITED STATES
DISTRICT COURT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, et al.,

Plaintiffs,

v.

PAUL KAYFETZ, et al.,

Defendants.

_____/

NO. C 82 6191 SW/WDB

REPORT AND RECOMMENDATIONS OF SPECIAL MASTER RE LIABILITY ASPECTS OF DEFENDANTS' MOTIONS FOR SANCTIONS

(Filed Jan. 11, 1990)

I. INTRODUCTION

On November 16, 1987, the District Court, by the Honorable Spencer Williams, granted summary judgment to defendants on all remaining claims in plaintiffs' amended complaint. Defendants subsequently moved for sanctions against plaintiffs and plaintiffs' counsel, the Pacific Legal Foundation ("PLF"). The District Court referred defendants' motions to this court, as special master, on June 22, 1988. Prior to referral, the parties had briefed the motions in anticipation of hearing by Judge Williams, who at that time had a familiarity with the case spanning six years.

Due to conflicting schedules of counsel, a status conference was not held by this court until October 6, 1988. At that time, the court determined that defendants had presented substantial bases for their claims for sanctions, bases that plaintiffs had not adequately rebutted. The court also determined that because the briefs reflected the parties' expectation of a hearing before a judge intimately

familiar with the numerous factual and legal issues presented by this case, those briefs were inadequate to support a competent decision by a judicial officer previously unfamiliar with the case. Thus, necessity required the filing of supplemental briefs by the parties and this court so ordered. Subsequently, the court also called for briefs on the First Amendment and other concerns that may arise when, as here, a nonprofit, public interest law firm faces sanctions after bringing claims on behalf of plaintiffs who bring civil rights claims.

At the court's invitation, the parties have submitted, at each of several different stages of briefing on these matters, substantial evidentiary material that it has been necessary for the court to study. The court has taken all of this material into account in reaching the conclusions set forth here, but it has not assumed that all of the material would be admissible under the rules of evidence or that all of it carries the same persuasive power. Since the purpose of the instant sanctions proceedings is not to try the case on the merits, but to explore the predicates (in information from the real world and in the law) for the many different claims advanced and positions taken by PLF on behalf of plaintiffs, it is appropriate to take into account some matter that might not be admissible under the rules of evidence. In some instances, however, it also has been appropriate to pass judgment on the relative reliability and persuasive power of the documents and declarations that have been presented. Where the exercise of such judgment has played a material role in the reasoning that supports any given conclusion or recommendation, we so indicate.

The careful consideration this court gave to all of the legal and factual matter that the parties presented in stages over a period of months consumed a great deal of our time. Then, in August of 1989, just before we were ready to circulate for comment our draft findings, a panel of Ninth Circuit judges issued *Townsend v. Holman Consulting Corp.*, 881 F.2d 788 (9th Cir. 1989), *rehearing en banc granted*, 888 F.2d 646 (1989). For reasons that will become clear, that opinion (which is being reconsidered as we write by the Court of Appeals *en banc*, although it has not been vacated) substantially changed the legal environment in which we were working and forced us back to the drawing board.

We finally issued our findings and recommendations in draft form on September 8, 1989. Appreciating the sensitivity of the matters with which we were dealing, and the magnitude of the potential sanctions, we wanted comments from all interested parties before reaching our final conclusions. Even though we had committed very substantial resources to considering the materials that already had been submitted and to preparing the draft of our report, we received comments that compelled us to reexamine many of the predicates for our conclusions in the draft. In response to PLF's submissions, in particular, we again examined the legal theories underlying the original and the amended complaints. Just as the District Court did, we have had considerable difficulty understanding what some of plaintiffs' theories were. This difficulty we blame in part on ourselves, but primarily on PLF's repeated failure to articulate those theories in a straightforward manner--its papers are compromised repeatedly by cryptic or conclusory assertions--and on

the fact that PLF often shifted ground on its legal theories. As we will make clear below, we were confronted in some key instances with legal targets that were simultaneously shifting and opaque.

After investing a great deal of effort, and at times searching independently for possible rationales for PLF's legal theories, this court decided that, given the demanding standards that the Ninth Circuit imposes in these kinds of proceedings, it was inappropriate to find, as we had in our draft recommendations, that PLF had commenced and prosecuted this entire action in bad faith. As we make clear in the pages that follow, we have concluded that a finding of bad faith is appropriate for only some of the causes of action in the original and amended complaint, not for these pleadings in their entirety. We also have concluded that PLF and/or individual, named attorneys proceeded in bad faith (1) in the manner in which they presented the inverse condemnation claims of the Mesa Ranch/Holter plaintiffs, (2) in filing a motion to strike, (3) in taking mutually exclusive positions on the same abstention issue at two different stages in the litigation, and (4) in refusing to comply with Judge Williams' order to "plead with specificity facts which indicate a nexus between each defendant and the alleged wrongs suffered."

As we were working through our revisions of the draft report the Supreme Court issued its opinion in *Pavelic & LeFlore v. Marvel Entertainment Group*, 58 U.S.L.W. 4038 (U.S. Dec. 5, 1989), holding that Federal Rule of Civil Procedure 11 as currently written cannot serve as a basis for imposing sanctions on a law firm, but only on the individual attorney who actually signed the

offending paper. we have considered carefully the implications of the *Pavelic* opinion for the motions under submission here. That opinion obviously forecloses reliance on Rule 11 to sanction PLF as an entity. We also have concluded, for reasons set forth in a subsequent section, that 28 U.S.C. § 1927 probably cannot serve as authority for imposing sanctions on PLF itself.

We believe, however, that shortfalls in the reach of Rule 11 and § 1927 do not rob the District Court of its inherent authority to take steps necessary to perform the functions assigned to it under the Constitution. Rule 11 and § 1927 are each independent, affirmative grants of authority to impose sanctions. They do not purport to displace one another. Nor do they purport to displace other grants of authority to assess attorneys' fees (such as 42 U.S.C. § 1988). In sum, they do not occupy the entire field of sanctioning authority (e.g., they co-exist with Rules 26(g) and 37). A court's exercise of its inherent authority to reach transgressions or transgressors that are not reached by Rule 11 or § 1927 would be problematic only if, in exercising that authority, the court was clearly undermining or defeating the purposes that inspired the rule or the statute. We believe that imposing sanctions on PLF in the circumstances of this case would have no such untoward effect. Rather, we believe that imposing the sanctions we recommend would advance many of the important policies that inform both Rule 11 and § 1927.

In considering these issues, we ask the District Court to examine the dictum at the end of the majority opinion in *Pavelic*, U.S.L.W. at 4039-40, dictum that could be used to support an argument that exercising inherent authority in the way we recommend here might undermine the

purposes of Rule 11.[1] Two points should be made about that dictum. First, it does no more than conclude that the

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[1] Respondents, and the opinion of the Court of Appeals, rely heavily upon the contention that the policies underlying Rule 11 will best be served by holding a law firm accountable for its attorney's violation. In the Court of Appeals' words, "[law firm] responsibility for Rule 11 sanctions will create strong incentives for internal monitoring, and greater monitoring will result in improved pre-filing inquiries and fewer baseless claims." 854 F.2d, at 1480. Even if it were entirely certain that liability on the part of the firm would more effectively achieve the purposes of the Rule, we would not feel free to pursue that objective at the expense of a textual interpretation as unnatural as we have described. Our task is to apply the text, not to improve upon it.

But in any event it is not at all clear that respondents' strained interpretation would better achieve the purposes of the Rule. It would, to be sure, better guarantee reimbursement of the innocent party for expenses caused by the Rule 11 violation, since the partnership will normally have more funds than the individual signing attorney. The purpose of the provision in question, however, is not reimbursement but "sanction"; and the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility. It is at least arguable that *these* purposes are better served by a provision which makes clear that, just as the court expects the signer personally—and not some nameless person within his law firm--to validate the truth and legal reasonableness of the papers filed, so also it will visit upon him personally—and not his law firm--its retribution for failing in that responsibility. The message thereby conveyed to the attorney, that this is not a "team effort" but in the last analysis *yours alone*, is precisely the point of Rule 11. Moreover, psychological

policy arguments relied upon by the respondents in that case to support law firm sanctions did not *compel* an interpretation of Rule 11 at odds with the Rule's language. The majority did *not* hold that permitting courts to sanction law firms would undermine the purposes of Rule 11. Second, the dictum in *Pavelic* seems to assume that courts always are faced with an either/or decision in imposing sanctions, i.e., that a court must choose between imposing sanctions solely on the individual lawyer who signed the pleading, or solely on the law firm. We do not believe, however, that courts always must make this choice. Rather, courts could impose sanctions in appropriate circumstances on *both* the attorney who signed the offending paper and on the law firm for which he or she works. Courts can require the individual lawyer personally to satisfy a specified part of the sanction award and require the firm to satisfy a different part of that award. Moreover, given the deterrence purpose of

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> effect aside, there will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will impose its sanction entirely upon him, and not divert part of it to a partnership of which he may not (if he is only an associate) be a member, or which (if he is a member) may not choose to seek recompense from him. To be sure, the partnership's knowledge that it was subject to sanction might induce it to increase "internal monitoring," but one can reasonably believe that more will be achieved by directly increasing the incentive for the individual signer to take care. Such a belief is at least not so unthinkable as to compel the conclusion that the Rule does not mean what it most naturally seems to say.

Pavelic & LeFlore, 58 U.S.L.W. at 4039-40.

the Rule, a court need not limit the size of the sanction to the expenses actually incurred by the victim-party. If necessary to achieve the deterrence objective, the court could (although we do not recommend this here) order the firm and the individual lawyer each to pay sanctions in an amount equal to the costs incurred by the victim-party.[2] In such an order a court could compel the individual attorney to make his or her payment to the victim-party and compel the offending law firm to make its payment to a court fund (e.g., a fund used to support educational programs for lawyers). In some circumstances, sanctions imposed in these ways clearly would advance the purposes of Rule-11.

In the circumstances of this case, which we describe in detail *infra*, we feel that the District Court must have the authority to impose sanctions on PLF itself if the Court is to be able to protect itself from misuse, to protect the interests of litigants who proceed in good faith, and to protect the viability of the rules of procedure that Congress and the Supreme Court have adopted. In every meaningful sense of the word, PLF shared responsibility for the bad faith actions that we describe below. As we show in subsequent sections, PLF was the source, the sponsor, and one of the intended beneficiaries of the offending conduct. There is no reason to believe that PLF did not know how this litigation was being handled, or that PLF was a mere passive and abstract institutional

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[2] A court that relies only on its inherent authority may not impose sanctions that exceed the fees incurred by the party-victim. *United States v. Blodgett*, 709 F.2d 608, 610-11 (9th Cir. 1983).

backdrop against which individual attorneys acted independently. Instead, PLF's principal officers formally associated themselves with and publicly claimed credit for the pleadings and other papers that we have concluded were filed in bad faith. Moreover, because PLF circulated at least 11 different attorneys through this case (without ever seeking permission for any attorney to join or to withdraw as counsel of record), it would be impossible for the District Court to meaningfully enforce the norms that Congress and the Supreme Court have established if the Court could not impose liability for offending those norms on PLF itself. These norms carry a promise of procedural fairness that the courts could not fulfill if they could not impose sanctions on an entity like PLF in circumstances like those described in the pages that follow. Thus we recommend that, relying on its inherent authority, the Court impose sanctions on PLF.

We also recommend, however, that the Court order us to initiate proceedings that could lead to imposition of sanctions on several individual PLF attorneys—Darlene Ruiz, Ronald Zumbrun, Robert Best, Harold Hughes, and Orrin Finch. For reasons set forth *infra*, we have concluded that certain papers, or parts of papers, were filed in bad faith. At this stage of the proceedings, it is not clear to us why the lawyers who signed those papers, or whose names appeared in the signature blocks, should not be sanctioned. We hasten to add, however, that it would not be fair at this juncture to impose sanctions on these individual lawyers because none of them have appeared or been represented, as individuals, in these sanctions proceedings. Should the District Court concur in our findings of bad faith and in our judgment that

sanctions proceedings with respect to the individual lawyers should go forward, then each individual lawyer who is exposed to possible sanctions under these recommendations should be given notice of this report, and granted an opportunity both to challenge the findings of bad faith and to show why it would be unfair or otherwise inappropriate to impose personal responsibility on that individual for the content of the papers on which his or her name appears.

At this stage of the proceedings we have decided only whether parts or all of certain papers were filed in bad faith. Pursuant to an agreement with counsel, we have decided to postpone the difficult task of determining the appropriate size of the sanctions until after resolving the liability issues. Thus, if the Court accepts some or all of our recommendations, it should order us to set up procedures for determining what the amounts of the sanctions should be.

II. BACKGROUND

Bolinas is an unincorporated township of approximately 2,000 persons in southern Marin County. A group of candidates running on an anti-development platform swept a 1971 election for seats on the board of the Bolinas Community Public Utility District ("BCPUD"), the only elected local governmental entity in Bolinas.

In November of 1971 the newly constituted BCPUD board declared a water emergency and enacted a water moratorium that prohibited additional water hookups. BCPUD has re-enacted the moratorium on various occasions since 1971, most recently in 1977.

Plaintiffs brought this suit in November of 1982 against BCPUD and other defendants on claims arising out of the moratorium. Plaintiffs were property owners in the Bolinas area at the time the complaint was filed. Two of the plaintiffs (the Gilberts) bought their land in 1955, while others (Mr. Macey and the Lockarys) did not acquire property in Bolinas until 1979, 1981, and 1982, several years after the moratorium was enacted. Plaintiffs Mesa Ranch and its general partner, Anton Holter, have owned property partially within BCPUD jurisdiction and partially adjacent to the district since at least the mid-1970s.

From the outset, plaintiffs have been represented in this action on a *pro bono* basis by PLF, a nonprofit, public interest law firm. PLF also has represented plaintiffs in two related state court actions.

PLF filed two complaints in the course of this litigation. Both alleged infringement of plaintiffs' constitutional and civil rights, as well as various antitrust violations, by 24 individual and entity defendants, including BCPUD and 13 of its current and former directors. The original complaint, filed in November of 1982, sought $10 million in damages for the civil rights violations, plus trebled damages for antitrust violations; the amended complaint, filed in August of 1983, dropped the $10 million prayer, and asked only for damages according to proof at trial.

Ten defendants, BCPUD plus nine current and former directors, now seek sanctions, in the form of attorneys' fees, from plaintiffs and plaintiffs' attorneys, PLF. These defendants defended this action for a period of five years,

until the District Court's final granting of their motion for summary judgment in November of 1987. BCPUD retained its own counsel for this litigation. Some of the individual defendants were provided representation by their insurance carriers, some defendants were represented by attorneys acting on a *pro bono* basis, some initially appeared *pro se*, and others retained their own counsel.

III. PROPOSED FINDINGS OF FACT

The findings of fact articulated here are based on the extensive record that has developed during the course of this action, and the substantial evidentiary submissions that have been made in connection with the instant motion for sanctions. Where the court has made a finding of fact based upon a declaration, signed pleading, or other submission, it has done so only where the allegation is either uncontradicted or where all the information available leads the court, without any significant reservation, to accept one view of a disputed issue and to reject the opposing view. In short, the court has applied a "clear and convincing" standard in its findings of fact even though a less stringent standard will suffice in such proceedings. *See, e.g.*, Judge Gesell's opinion in *Cinciarelli v. Reagan*, 556 F.Supp. 99, 101 (D.D.C. 1983) (applying preponderance of evidence standard to bad faith exception to American Rule on attorneys' fees). The court has applied this stringent standard out of a caution it finds appropriate where the sensitive concerns that generally attend imposition of sanctions are made even more delicate when sanctions are sought against a nonprofit,

public interest law firm giving *pro bono* representation to plaintiffs who bring civil rights claims.

1. On November 26, 1971, the Bolinas Community Public Utility District ("BCPUD") declared "a water shortage emergency condition to exist within the area served by the District" (Resolution No. 93), and enacted "a water moratorium on new or additional service connections." Resolution No. 173, July 20, 1977. BCPUD has continued the moratorium and affirmed it by several subsequent resolutions: Resolution No. 113, September 13, 1972; Resolution No. 130, January 2, 1974; Resolution No. 173, July 20, 1977. Exhibit A to Lockary Declaration, Dkt. No. 384. In declaring the emergency and enacting the water connection moratorium, BCPUD purported to act pursuant to California Water Code § 350, *et seq.*

2. In November of 1982, the State of California Department of Health Services informed BCPUD that it was conditioning the district's state water permit on BCPUD's continuation of the moratorium "until additional water sources are developed and/or an adequate supply is demonstrated to the satisfaction of the Department of Health Services." Exhibit D to BCPUD's Status Conference Statement, Dkt. No. 350 (Department of Health Services Water Supply Permit and letter setting forth specific provisions of the permit).

3. The moratorium has been the subject of litigation in state court. A mandamus action filed in 1976, *Bolinas Property Owner's Association, et al. v. Bolinas Community Public Utility District*, No. 81460 (Superior Court of Marin County), challenged the moratorium on takings and equal protection grounds. Exhibit 10 to Finch Declaration

Re Prefiling Inquiry, March, 1989 (original complaint in BPOA action). After substantial motion activity, the action was dismissed without prejudice in May of 1979. In a recent state court mandamus action, *Gilbert v. State of California*, No. 636481-0 (Superior Court of Alameda County), a state court dismissed, with prejudice, claims that the moratorium resulted in an unconstitutional taking of property. BCPUD's Comments re Draft Recommendation, filed Sept. 18, 1989, at 4-5; Yuhas Declaration, filed Jan. 6, 1989, at ¶ 8 and Exhibit F, (order in *Gilbert* granting sanctions to BCPUD). Other causes of action in the *Gilbert* case are apparently still pending. BCPUD's Comments Re Draft Recommendation, filed Sept. 18, 1989, at 4-5.

4. Plaintiff Matthew Lockary owned real property in Bolinas, which he purchased in 1981 and 1982. Yuhas Declaration, January, 1989, at 2, and attached Lockary Deposition at 10, and Grant Deeds recorded June 15, 1981 and November 5, 1982. Plaintiffs Charles and Phyllis Gilbert ("the Gilberts") owned real property in Bolinas, which they purchased in 1955. Yuhas Declaration, Jan. 1989, at 3, and attached Joint Tenancy Deed recorded October 6, 1955. Plaintiff James Macey owned real property in Bolinas, which he purchased in 1979 and 1982. Yuhas Declaration, Jan. 1989, at 2, attached Macey Deposition and Grant Deeds recorded September 11, 1979, and June 2, 1982. These properties consisted of unimproved lots, zoned for residential development, lying within the jurisdiction of BCPUD.

5. Plaintiff Anton Holter was general partner of Mesa Ranch, Inc., whose holdings included approximately 210 acres of unimproved real property, about one

acre of which was within BCPUD jurisdiction. That portion of Mesa Ranch within the district had been granted a water meter sometime prior to this lawsuit, and water service to that acre parcel continued throughout the pendency of this litigation. Holter Declaration, December, 1986, Dkt. No. 344 at 1.

6. In November 1981, the Gilberts contacted the Pacific Legal Foundation ("PLF"), which sometime thereafter agreed to represent the Gilberts and the other plaintiffs in this action. Finch Declaration Re Prefiling Inquiry, March 1989, at ¶ 5. PLF began investigating the facts underlying the claims of the Gilberts and the other plaintiffs at least as early as March of 1982. Finch Declaration at ¶ 6, and attached Exhibit 4.

7. On November 10, 1982, PLF filed the original complaint in this case on behalf of Mr. Lockary, the Gilberts, Mr. Macey, and Mr. Holter. Dkt. No. 1. The complaint was signed by PLF trial team leader, attorney Darlene E. Ruiz, with the names of PLF attorneys Ronald A. Zumbrun and Harold J. Hughes listed above the signature line.[3] Complaint at 39. The complaint named 24 defendants, including BCPUD and 13 of its former and

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[3] The attestation of the complaint reads as follows:

Respectfully submitted,

RONALD A. ZUMBRUN
HAROLD J. HUGHES
DARLENE E. RUIZ

by [signature of Darlene Ruiz]
DARLENE R. RUIZ

Attorneys for Plaintiffs

current directors, the Bolinas Planning Council (a private advocacy group) and eight of its directors, as well as the Marin County planning department.

8. The complaint alleged, *inter alia*, that defendants had engaged in an "integrated course of conduct" which "in the aggregate caused a *de facto* transfer of substantial rights and interests in the undeveloped real property from the owners thereof to defendants and the residents of Bolinas, through depriving plaintiffs of all reasonable use of their properties, for the benefit and enrichment of defendants and certain of the other residents of Bolinas." Complaint at 9. The complaint included the following causes of action:

(1) "taking without compensation",

(2) "denial of due process of law",

(3) "discrimination in application of building and safety and permitting ordinances, BCPUD resolutions, local coastal plan, and land regulation laws",

(4) "deprivation of civil rights,"

(5) claims for "extraordinary relief and interim damages for temporary taking"

(6) "antitrust violations," pursuant to 15 U.S.C. § 1,

(7) "antitrust violations," pursuant to 15 U.S.C. § 2,

and

(8) claims for "declaratory relief," pursuant to 28 U.S.C. §§ 2201 and 2202.

Complaint at 13-36.

9. Plaintiffs sought damages for civil rights violations of $10 million (the claimed fair market value of the property) trebled for antitrust violations under the Sherman Act, as well as "interim damages for a temporary taking . . . [in an amount] presently not precisely ascertainable", declaratory and injunctive relief, consequential damages, interest, attorneys' fees, and costs. Complaint at 36-39.

10. Plaintiffs challenged, without limitation or specification

> a. all existing orders and resolutions of BCPUD declaring and continuing a water emergency and building moratorium;
>
> b. all county building and safety, water and sewage, and permitting ordinances, which have been wrongfully and selectively enforced against property owners of undeveloped property since institution of the moratorium;
>
> c. all statutes, administrative regulations, and county plans and ordinances in purported implementation of the local coastal plan dealing with Bolinas;
>
> d. all discriminatory enforcement of land use regulations to prohibit and restrict development;
>
> e. such further and additional acts of defendants, and each of them, which are part of the continuous and integrated course of conduct herein described, as may hereafter be discovered or determined to be violative of the constitutional provisions above identified as applied generally for the reasons herein set forth, and

which may have contributed to the damage done to plaintiffs.

Complaint at ¶ 64.

11. Plaintiffs expressly stated that they were not challenging "the right of a public utility district to lawfully declare a water 'emergency' condition to exist or to enact a moratorium pending the resolution of the 'emergency' condition." Consolidated Response in Opposition to Motions Seeking Abstention, Dkt. No. 74 at 7-8; *see also* Order and Memorandum Re: Defendants' Motion for a More Definitive Statement, Dkt. No. 109.

12. At the first status conference in this case held in 1983, Judge Williams granted defendants' request to stay discovery. Status conference order No. 1, Dkt. No. 41. Notwithstanding the stay of discovery ordered by the Court on March 7, 1983, PLF shortly thereafter filed an action for a writ of mandate in state court seeking to inspect under the California Public Records Act "virtually all of the Bolinas Community Public Utility District records." Order Re Writ of Mandate, *Wolfe v. Bolinas Community Public Utility District*, No. 115257 (Superior Court of Marin Co., order filed Jan. 19, 1984), *aff'd* by *Wolfe v. Bolinas Community Public Utility District*, No. A026949 (1st App. Dist., filed May 6, 1988) (not published), attached as Exhibits E and F to Harris Declaration, Feb. 16, 1988. The Superior Court found that the plaintiffs' action under the Public Records Act was "clearly frivolous" and brought "to harass the District" and "for an improper motive." Order at 4. The Superior Court noted that petitioner's counsel, PLF, "represented

plaintiffs in a federal action filed in early 1983 [sic] against the same defendant, (the Lockary case)", and

> that the disclosures plaintiff sought in this action were to be used in prosecuting the federal action. A review of events leading to the filing of this action convinces this Court that this action was brought for an improper motive.

Order at 4. The state court awarded attorneys' fees and costs, which was affirmed on appeal. Exhibit F to Harris Declaration, Feb. 1988 (*Wolfe v. Bolinas Community Public Utility District*, No. A026949 (1st App. Dist., filed May 6, 1988) (not published)).

13. Five months after the complaint was filed, defendants moved to dismiss the complaint on the grounds that (1) there had been no compensable taking, (2) there were no violations of plaintiffs' procedural rights, (3) in the absence of a proprietary interest, and as BCPUD's actions were legislative in nature, there could be no antitrust violations, and (4) all defendants enjoyed immunity. *See, e.g.*, Memorandum of Bolinas Planning Council, Dkt. No. 58, and Memorandum of BCPUD, Dkt. No. 46. Defendants argued that the complaint was time-barred because it challenged actions of defendants beyond the three and four year limitations periods for constitutional and civil rights claims, and beyond the four year limitations period for antitrust claims. *Id.* Defendants also argued that the nature and scope of the allegations were vague, overbroad, and confusing. *Id.*

14. On June 22, 1983, the District Court granted defendants' motions to dismiss as to all counts, but granted plaintiffs' motion for leave to amend. Order and

Memorandum Re: Defendants' Motion for a More Definitive Statement, Dkt. No. 109. The Court admonished plaintiffs for their failure to plead with "specificity" and their failure to plead a "proprietary interest" in the antitrust claims, and admonished plaintiffs' attorneys for their "very, very broad . . . [h]ard to follow" complaint and its "mere conclusory statements." Transcript of Hearing on Plaintiffs' Motion to Strike and Defendants' Motion to Dismiss, June 22, 1983, at 11, 22, 27, attached to Exhibit 14 to Defendants' Supplemental Appendix, filed April 3, 1989. The Court also noted its concern over the possible "detrimental" effect that plaintiffs' claims of individual liability on the part of individual BCPUD directors could have on the willingness of citizens to serve in local government when they may "have to put all their entire fortune and their reputation on the line [and] be subject to many, many lawsuits." *Id.* at 39. Judge Williams gave plaintiffs' attorneys a final piece of advice with respect to future complaints: "Be specific." *Id.* at 41.

15. In its subsequent order and memorandum, the District Court went to great length to explain to plaintiffs' counsel the deficiencies of their pleading:

> The court [has] granted what amounts to a motion for a more definite statement. Plaintiffs' counsel was instructed to file a new complaint which states with sufficient specificity facts which indicate how plaintiffs' rights were violated, who was responsible for the pertinent acts, and when these acts occurred. Counsel was also directed to state with specificity facts which, if proven true, prevents [sic] this action from being time-barred by the applicable statutes of limitations.

* * *

As noted, the court agreed with defendants' contentions that plaintiffs' claims as asserted in the complaint are supported by little more than overbroad, legally conclusory allegations that fail to adequately identify their legal or factual bases. Without specification as to who, what, where, when and how, the complaint, among other allegations, challenges without limitation all statutes implementing the local coastal plan, all BCPUD orders and regulations declaring and continuing the water moratorium and emergency, all "wrongfully enforced" county building and safety, water and sewage and permitting ordinances, all resolutions, county plans and ordinances implementing the local coastal plan and all land use regulations which are being enforced to restrict development. Despite the breadth of these allegations, the only clearly specified action that is alleged involves the enactment by the BCPUD of the water emergency and moratorium. It is not clear from the complaint which of the defendants participated in their passage.

* * *

Clear, precise pleadings are particularly important in cases such as this in which numerous defendants are named—including many entitled to at least some form of immunity, multiple causes of action are pled against all defendants, and the allegations encompass an extended period of time.

* * *

With these considerations in mind, plaintiff is instructed to plead with specificity facts which

> indicate a nexus between each defendant and the alleged wrongs suffered.
>
> Equally important, it is expected that the amended complaint will state with specificity the dates these acts occurred and the dates plaintiffs were first injured or first became aware of their injuries . . . It is therefore essential that plaintiffs amend their complaint to state with specificity facts and dates that have a bearing on the question of timeliness.

Order and Memorandum, July 5, 1983, Dkt. No. 109, at 3-5.

16. Judge Williams also warned plaintiffs and plaintiffs' counsel that they were running the risk of sanctions:

> Finally, the court would be remiss if it failed to remind plaintiff that it is deeply concerned about the potential impact this kind of litigation might have on the willingness of individuals to become involved in government, either as private citizens or as elected officials. If in fact plaintiffs have been the victims of a comprehensive scheme to deprive them of their civil and constitutional rights then they shall be compensated with appropriate relief from the appropriate parties. *If, however, this action proves, in whole or in part, to be frivolous, if it proves to be merely a pretext for "punishing" defendants for their political beliefs or actions, the court will take whatever steps are necessary and proper to ensure that defendants are fully compensated for the time and resources they are forced to expend in defense of this action.*

Id. at 5-6 (emphasis added).

17. Plaintiffs returned with their amended complaint on August 4, 1983. Dkt. No. 112. It was once again

signed by PLF attorney Darlene E. Ruiz, with Ronald A. Zumbrun and Harold J. Hughes listed above the signature line in the manner of the original complaint. *See* note 3, *supra*. The amended complaint included 16 claims for relief, including:

(1) "First Amendment denials",

(2) "taking of property without payment of just compensation",

(3) "denial of due process",

(4) "discrimination in application of water usage and utility regulations",

(5) untitled claim alleging unauthorized planning activity by the Bolinas Planning Council, absence of notice and due process, and arbitrary and capricious acts,

(6) "inverse condemnation" of Mesa Ranch,

(7) "civil rights violations",

(8) "extraordinary relief and interim damages for temporary taking",

(9) "conspiracy to deprive plaintiffs of civil rights",

(10) "conspiracy in restraint of trade",

(11) "conspiracy to monopolize",

(12) "antitrust violations", and

(13) "declaratory relief".

Amended Complaint at ¶¶ 44-212.

Claims numbered two through sixteen "incorporate[d] by reference each and every paragraph of th[e] amended complaint . . . . " Amended Complaint, *Passim.*

18. Defendants moved to dismiss the amended complaint in October of 1983. The District Court granted the motion to dismiss the Bolinas Planning Council and its directors from the action for lack of specificity. Order and Memorandum Granting In Part and Denying In Part Defendants' Motion to Dismiss, Dkt. No. 168 at 17. The Court also dismissed all the antitrust claims in the amended complaint on the grounds that defendants enjoyed *Parker* and *Noerr-Pennington* immunity, and dismissed all claims that did "not specifically concern the enactment and enforcement of the moratorium." *Id.* at 18-24, 29. The Court denied the motion to dismiss the claims against BCPUD, BCPUD directors, and the County, for constitutional and civil rights claims arising out of the enactment and maintenance of the water moratorium. *Id.* at 27. The Court also held that individual BCPUD directors were absolutely immune from liability for their legislative acts, but enjoyed only qualified immunity for their executive acts such as moratorium enforcement. *Id.* at 27.

19. In order to avoid the statute of limitations bar, the amended complaint pleaded the "fraudulent concealment" and "continuing wrong" exceptions. *See* order and Memorandum of Law Granting in Part and Denying in Part Defendants' Motion to Dismiss, Dkt. No. 168 at 4, n.2. Throughout the amended complaint, plaintiffs repeatedly alleged that the acts of defendants "could not have become known to plaintiffs until sometime after November 11, 1979" and that plaintiffs "could not have learned of the unlawful wrongful purpose of defendants

acts until sometime after November 11, 1979." *See, e.g.*, Amended Complaint at ¶¶ 114 and 136. The date of November 11, 1979, had no significance, or factual basis, apart from its being simply three years before the filing of the original complaint. Judge Williams held that plaintiffs' fraudulent concealment theory "fail[ed] for lack of specificity." In so ruling, he held that plaintiffs could not " 'rely upon conclusory statements to avoid the bar of limitations,' but 'must plead with particularity the circumstances surrounding the concealment and state facts showing due diligence in trying to uncover the facts.' " Order and Memorandum, Dkt. No. 168 at 6 (citation omitted). However, Judge Williams also held that the "claims which arise directly from the implementation and enforcement of the water moratorium are not barred because they fall within the continuing wrong exception to the statute of limitations." *Id.* at 5.

20. Although plaintiff Gilbert claimed in the amended complaint that he had no knowledge of defendants' allegedly wrongful acts prior to November 11, 1979, he has admitted that he contributed to and communicated with the Bolinas Property Owners Association during the nearly three years of pendency of BPOA's 1972 state court suit--a suit which attacked much of the same conduct that plaintiffs attack in the instant action.[4]

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[4] The BPOA suit alleged that the moratorium was "arbitrary and capricious", Complaint at 5 and 8, the water emergency was a "sham" and was enacted for growth control purposes, *id.* at 6, 7, 8 and 10, BCPUD failed to maintain or increase water supply capabilities, *id.* at 9-10, inadequate notice was given, *id.* at 4-5, and plaintiffs suffered deprivation of value as a result, *id.* at 6.

Gilbert Deposition, Exhibit 3 to Finch Declaration, filed April 3, 1989.

21. In his Order and Memorandum of January 20, 1984, Judge Williams criticized plaintiffs for failing to comply with his earlier order 'regarding specificity of pleading:

> [a]lthough plaintiffs have *doubled the number of claims* for relief and added 21 pages to their complaint, they have *added virtually no specificity.*

Order and Memorandum, Dkt. No. 168 at 4 (emphasis added). For instance, in both the complaint and the amended complaint, PLF failed to distinguish the various facts regarding the circumstances of the plaintiffs and the widely differing dates of their purchase of property in Bolinas. Instead, PLF drafted the complaints so as to lump together the later purchasers with the earlier ones:

> Plaintiffs have owned property and paid taxes on property within Bolinas *for as much as a quarter of a century.*

Amended complaint at ¶ 2 (emphasis added).

> Plaintiffs, Lockarys, Gilberts, and Macey, purchased their properties in reasonable reliance on the ability to build single-family residences. *At all times relevant, all plaintiffs* reasonably planned, intended, and expected to develop and utilize the property consistent with residential zoning and building requirements.

Id. at ¶ 38 (emphasis added).

22. In May of 1984, several individual defendants sought to gain information from plaintiffs concerning their claims by propounding interrogatories. For example, defendant Marguerite Harris propounded a set of six interrogatories. The first asked:

> Please describe fully all acts or omissions or other conduct of HARRIS which you contend are both (i) relevant to your claims in this action and (ii) outside the scope of legislative immunity. In describing such act, omission, or other conduct, please state (a) the date or dates on which the act, omission, or other conduct occurred, (b) describe the place or places at which the conduct occurred, (c) identify the person or persons present during the act, omission, or other conduct, (d) identify all persons who witnessed the act, omission, or other conduct, and (e) identify all persons whom you believe have any knowledge of the act, omission, or other conduct.

Exhibit A to Harris' Memorandum in Support of Motion for Fees, filed February 16, 1988, at 5.

23. Plaintiffs' responses to these interrogatories, dated June 18, 1984 (more than two years after plaintiffs began their investigations), stated in part:

> We have received to date from our clients, from other individuals, and from public entities several tens of thousands of feet of photographic film and magnetic tape as well as several thousand copies of documents. We have not yet had an opportunity to review all of the information that we have collected in this case and we do not yet know all of the specific answers which this interrogatory requests.

PLF then recapped the conclusory claims in the complaint, i.e. that defendant Harris "participated in the fabrication and perpetuation of a sham water emergency designed and implemented for the purpose of preventing plaintiffs from using their property." Answers to Harris' Interrogatories, Dkt. No. 264.

24. Months later, PLF supplemented its answers with more substantial information about defendants' alleged wrongful acts. Most of the alleged wrongful acts were public votes by the defendants while on the BCPUD board to enact and re-enact the moratorium, approve various expanded water uses, and approve various transactions involving BCPUD property. *See* Supplemental Answers, Dkt. Nos. 272-78.

25. The Mesa Ranch property was sold to the United States in 1984, during the course of this litigation, for $1,100,000. Exhibit J to Harris Declaration, filed May 20, 1987.

26. Plaintiffs filed a motion in 1985 asking the court to abstain from exercising its jurisdiction, under the *Pullman* abstention doctrine, so that a state court action could be filed. Dkt. No. 298. The motion and accompanying memorandum were both signed by Robert K. Best of PLF, with the names of PLF attorneys Ronald A. Zumbrun and Thomas W. Birmingham listed above the signature line. Dkt. Nos. 298 and 299. PLF moved for abstention despite the fact it opposed defendants' *Pullman* abstention motion brought two years earlier. In its 1985 motion, PLF argued that "the aspect of this case relating to the allocation of water *is a most sensitive area of social Policy* during times of a water shortage." Plaintiffs' Memorandum in

Support of Abstention, Dkt. No. 299 at 3 (emphasis added). However, in response to defendants' earlier motion, PLF had argued that "*[n]o sensitive area of social policy exists*; no definitive ruling on a state issue would avoid the constitutional adjudication; no determinative issue of state law would remain in doubt should the federal court decide the issues." Consolidated Response, Dkt. No. 74 at 1 (emphasis added).

27. Plaintiffs renewed their abstention motion in January of 1987. Dkt. Nos. 338 and 339.

28. In February of 1987, PLF filed a motion to dismiss *with prejudice* all of the remaining claims it brought on behalf of the Mesa Ranch/Holter plaintiffs. Dkt. Nos. 342 and 343. Neither the notice of motion nor the accompanying memorandum included any discussion of fees and costs. In the proposed dismissal order PLF included the proviso that "all parties [would] bear their own costs and attorneys' fees." Mesa Ranch Proposed Order Re Dismissal Motion, submitted with Dkt. No. 343.

29. Defendants refused to waive any right to collect fees and costs and proposed that the dismissal order reserve the issue of responsibility for fees and expenses. PLF then refused to accept the reservation offered by defendants, and the Court denied PLF's motion to dismiss its claims on the terms on which it insisted. *See* Transcript, March 4, 1987 at 18.

30. Following the District Court's refusal to let Mesa Ranch/Holter voluntarily dismiss, BCPUD and other defendants moved for summary judgment against plaintiffs on the remaining takings, inverse condemnation, and due process claims. Dkt. Nos. 361-67, 371-80,

and 419-20. Plaintiffs filed papers opposing summary judgment. Dkt. Nos. 381, 382, and 432.[5]

31. In August of 1987, while opposing the motions for summary judgment, PLF once again renewed its motion for abstention and simultaneously moved for dismissal of all claims against seven of the remaining ten individual defendants "only to facilitate abstention." Consolidated Memorandum in Support of Motions for Order Abstaining from Exercise of Jurisdiction and Dismissals, Dkt. No. 423 at 6. Based on their interest in obtaining full summary judgment and an award of attorneys' fees as sanctions, and on their fear of a "guaranteed return trip to this court," defendants opposed the renewed motion for abstention and the dismissals. BCPUD Response, Dkt. No. 439 at 2-10.

32. On November 16, 1987, the District Court denied plaintiffs' motions for voluntary dismissal and abstention and granted defendants' motions for summary judgment. Order Denying Plaintiffs' Motion For Abstention and Granting Defendants' Motions For Summary Judgment, Dkt. No. 457. Judge Williams granted summary judgment against the taking (inverse condemnation) and substantive due process claims of plaintiffs Lockarys, Gilberts, and Macey on the grounds that these

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[5] All three opposition papers were submitted by Ronald Zumbrun, Robert Best, and Orrin Finch of PLF. The opposition papers to summary judgment on the Mesa Ranch/Holter claims and on the inverse condemnation and due process claims were actually signed by Mr. Best, while the opposition to summary judgment on the procedural due process claims was signed by Mr. Finch.

plaintiffs, as only potential water users, had no property right recognized by California law in a water hookup upon which to base an inverse condemnation or due process action. *Id.* at 7. Judge Williams also granted summary judgment against these plaintiffs' procedural due process claims on the grounds that individualized notice was not required under established principles of constitutional law, that defendants' compliance with state law requiring notice by publication of water moratorium enactment was sufficient to satisfy due process, and that plaintiffs lacked a property interest in a water hookup. *Id.* at 6-8. Finally, Judge Williams dismissed plaintiffs Mesa Ranch/Holter's "precondemnation de facto taking" claim on the grounds that defendants' challenged actions "do not rise to the level of condemnation proceedings." *Id.* at 12.

33. Various defendants then moved for sanctions in the form of attorneys' fees, including the following defendants and their attorneys, in the following claimed amounts:

a. BCPUD, by Richard Harris: "in excess of $250,000 [Dkt. Nos. 497-500];

b. Marguerite Harris, by Matthew White: $17,834.12 [Dkt. Nos. 480-82];

c. Judith Weston, by Larry Langley: $22,908.75 [Dkt. Nos. 484-85];

d. William Niman and Orville Schell, by Gary Ginder: $27,175.82 [Dkt. Nos. 486-89];

e. Paul Kayfetz, by Michael Hardiman: $87,961.00 [Dkt. Nos. 491-92];

f. Doris LeMieux, Diana Lopez Farnsworth, and Jack McClellan, by Laurence Pulgram: $36,842.39 [Dkt. Nos. 494-96];

g. Victor Amoroso, by David Becht: $32,885.61 [Dkt. Nos. 501-03].

34. Plaintiffs and PLF have been on notice from the beginning of this litigation that defendants were likely to seek sanctions. From the start, defendants have decried these claims as frivolous and brought in bad faith. BCPUD Answer, Dkt. No. 179 at ¶¶ 125-128 & Prayer; *see also* Answers filed by other defendants, Dkt. Nos. 172-81, 185, and 186. Defendants' pleadings included prayers for "attorneys' fees and costs incurred as a result of bad faith and malice of plaintiffs and of their attorneys." *See. e.g.*, Answer of Harris, Dkt. No. 172 at 23. At least as early as February of 1987 defendants had notified the District Court, plaintiffs Mesa Ranch/Holter, and PLF, that they were seeking attorneys' fees for the "groundless" claims asserted by counsel for those plaintiffs. BCPUD's Status Conference Statement, Dkt. No. 350 at 4.

35. In March of 1988, PLF brought a state court action on behalf of plaintiffs Lockarys, Gilberts, and Macey, *Gilbert v. State of California*, No. 636481-0 (Superior Court of Alameda County), asserting, under parallel state constitutional provisions, some of the same claims asserted in the dismissed federal action. Yuhas Declaration, Jan. 1989, at ¶ 8. After the state court judge sustained BCPUD's demurrer to the inverse condemnation claims, PLF filed an amended petition which included, in virtually unchanged form, those same causes of action. In sustaining BCPUD's second demurrer, the state court invited a motion for sanctions. BCPUD's subsequent

motion for sanctions was granted in its entirety. *See* Exhibit F to *id.* The sanctions award to BCPUD has been affirmed on appeal. *Gilbert v. State of California,* No. A044805 (lst App. Dist., Div. 4, filed Dec. 27, 1989) (not published).

36. PLF was the sponsor of this litigation, and was actively involved in all phases of the case. PLF has repeatedly been described by its president, Ronald A. Zumbrun, as the force behind the *Lockary* lawsuit:

> One of the most significant PLF law suits in recent years was filed late last year in San Francisco federal court. . . .
>
> PLF filed suit on behalf of five property owners in Bolinas. . . .
>
> * * *
>
> As in many land use cases brought by PLF. . . .
>
> The PLF suit alleges that water district policies violate the Fifth Amendment guarantee of payment of just compensation. . . .
>
> This case will be an extremely important one for PLF. . . .

Exhibit C to Harris Declaration, June 1988 (excerpts from the Pacific Legal Foundation publication, *The Reporter,* March 1983).

37. In claiming credit for this action, Mr. Zumbrun, whose name was listed as a counsel of record on both complaints, also made clear PLF's intent in the case:

> By filing this suit in federal court, PLF hopes to stem this frightening practice from moving nationwide.

Id.

> PLF has filed suit against the [water] district in federal court, thus circumventing the California courts, which have been decidedly reluctant to clarify the just compensation issue in other PLF cases. We are seeking substantial personal damages from the water district board members, putting all government entities on notice that we are going to the mat on this one. We have requested a jury trial, and will be arguing on the basis of Fifth Amendment rights, just compensation, Civil Rights Act guarantees, and Sherman Antitrust implications. . . . It should make for some interesting courtroom proceedings.

Exhibit H to Harris Declaration, Feb. 1988 (excerpts from Pacific Legal Foundation publication, *The Reporter*).

38. PLF's 1985-1986 Annual Report, in a section titled "Litigation and Regulatory Reform," listed "cases and issues in which PLF actively participated in fiscal year 1985-86." The list described this case and the Wolfe state court action: "*Lockary v. Kayfetz* (supporting property and civil rights of property owners)" . . . "*Wolfe v. Bolinas Community Public Utilities District* (supporting right of public access to public records)." Exhibit J to Harris Declaration, Feb. 1988, at 12-13.

39. Plaintiffs have been represented throughout this action only by PLF attorneys. PLF has circulated no fewer than eleven attorneys through this case, none appearing or withdrawing by formal leave of court. *See, e.g.*, Dkt.

Nos. 1, 249, 335, 338, 506, and 510. Virtually every page of every pleading filed by plaintiffs in this case (now containing over 630 docket entries) has been on pleading paper imprinted with the PLF logo, name, address, and telephone number. *Passim.*

40. PLF has represented itself to be a law firm that participates in litigation "as counsel" and that exercises "quality control" in litigation. Exhibit I to Harris Declaration, Feb. 1988 (PLF Tenth Annual Report at 1). PLF has represented itself to the Internal Revenue Service and to the Attorney General of California as a "Public Interest Law Firm." Exhibit G to *id.* (PLF's Periodic Report to Attorney General of California). PLF fundraising solicitations are based on it status as a law firm:

> [PLF is t]he largest nonprofit, public interest law firm of its kind, dedicated to insuring that the rights of the public prevail over the rights of narrowly-based special interest groups.

Exhibit I to Harris Declaration, Feb. 1988, at 1 (excerpt from PLF Tenth Annual Report). PLF has represented that a plaintiff in a case filed by PLF attorneys is a "Pacific Legal Foundation client." Exhibit B to Harris Declaration, June 1988 (*The Recorder,* May 13, 1985).

41. During the pendency of this litigation, PLF has used its involvement in this case and the *Wolfe* case as a basis to solicit financial contributions. Exhibit J to Harris Declaration, Feb. 1988 and Exhibit C to Harris Declaration, June 1988. PLF fundraising efforts generated $2,234,349 between March 1, 1983 and February 29, 1984. Exhibit G to Harris Declaration, Feb. 1988. Various PLF

publications, reports, and pamphlets carry PLF fundraising solicitations based on reports of litigation in which PLF is involved, including this case. *See, e.g.*, Exhibits H, I, J, and K to *id.* For instance:

> [In 1982] PLF participated in more than 100 separate cases involving the environment, land use, property rights . . . *We entered into a nationally significant land use case involving a water district in Bolinas, California, which is restricting water access as a means of furthering its own no-growth policies. This one may well go all the way to the U.S. Supreme Court, and finally force the Court to address the issue of just compensation for the unlawful taking of private property.*

Id., Exhibit I at 2 (emphasis added).

IV. LEGAL STANDARDS

Defendants propose four partially overlapping authorities as bases for imposing sanctions. They include the inherent equitable authority of the court, 28 U.S.C. § 1927, 42 U.S.C. § 1988, and both the pre- and post-1983 versions of Federal Rule of Civil Procedure 11. Each is discussed in turn.

A. The Inherent Equitable Authority of the Court

"Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require." *Hall v. Cole*, 412 U.S. 1, 4-5, 93 S.Ct. 1943, 1945-46,

36 L.Ed.2d 702 (1973) (citations omitted). Accordingly, when a prevailing party's opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons," a federal court may award attorneys' fees under its unquestioned inherent authority.[6] *Id., quoting* 6 J. Moore, Federal Practice ¶ 54.77[2], at 1709 (2d ed. 1972) (citations omitted). *See also Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 258-259, 95 S.Ct. 1612, 1622, 44 L.Ed.2d 141 (1975); and *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1979).

The "bad-faith" exception "for the award of attorney's fees is not restricted to cases where the action is *filed* in bad faith." *Roadway Express, Inc. v. Piper,* 447 U.S. at 765, 100 S.Ct. at 2464, (emphasis added). " '[Bad] faith' may be found not only in the actions that led to the lawsuit, but also in the conduct of the litigation.' " *Id., quoting Hall v. Cole,* 412 U.S. at 15, 93 S.Ct. at 1951.

The Ninth Circuit has thus applied the concept of bad faith to endorse use of the court's "inherent power to impose sanctions on counsel who 'willfully abuse(s) judicial processes.' " *United States v. Blodgett,* 709 F.2d 608, 610 (9th Cir. 1983), *quoting Roadway Express,* 447 U.S. at 766, *and citing Barnd v. City of Tacoma,* 664 F.2d 1339, 1342 (9th Cir. 1982).

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[6] As the Supreme Court made clear in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1979), "[t]he inherent powers of federal courts are those which 'are necessary to the exercise of all others." 447 U.S. at 764, *citing United States v. Hudson,* 7 Cranch 32, 34, 11 U.S. 32, 3 L.Ed. 259 (1812).

Because the courts' "inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express*, 447 U.S. at 764-765 (citations omitted). With this caution in mind the Supreme Court has, nonetheless, made clear that a federal court may use its inherent authority to award fees against both a party and the party's attorney. "There are ample grounds for recognizing . . . that in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel." *Roadway Express*, 447 U.S. at 765. Those circumstances include instances of "abusive litigation practices." *Id.* A court may use its inherent authority to impose sanctions on a law firm, as well as individual attorneys, if such a sanction is warranted. *Glass v. Pfeffer*, 849 F.2d 1261, 1263, 1266-67 (10th Cir. 1988). The amount of an attorneys' fees sanction imposed under a court's inherent power is limited to "the amount of fees incurred by the opposing party." *United States v. Blodgett*, 709 F.2d at 610-11, *citing Roadway Express*, 447 U.S. at 766.

B. 28 U.S.C. § 1927

28 U.S.C. § 1927 provides for the assessment of sanctions, including attorneys' fees, directly against counsel. As amended in 1980, § 1927 reads:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy

> personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.[7]

Despite its explicit sanction of "unreasonable" conduct, courts historically limited § 1927 awards to cases of bad faith.[8] More recent Ninth Circuit opinions have made it clear that finding of either recklessness or bad faith will support imposition of § 1927 sanctions. "The imposition of sanctions under section 1927 requires a finding that counsel acted 'recklessly *or* in bad faith.' " *United States v. Blodgett*, 709 F.2d at 610 (emphasis added), *quoting Barnd*, 664 F.2d at 1343. The Ninth Circuit has thus made clear that while an attorney may be sanctioned under § 1927 for multiplying proceedings unreasonably and vexatiously "only on a showing of the attorney's *recklessness or bad faith* . . . bad faith is present when an attorney *knowingly or recklessly* raises a frivolous argument, *see, e.g., Optyl Eyewear Fashion Int'l. Corp. v. Style Cos.*, 760 F.2d 1045, 1048 (9th Cir. 1985), or argues a meritorious claim for purpose of harassing an opponent." *Estate of*

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[7] Prior to the 1980 amendment, § 1927 did not specifically include mention of liability for attorneys' fees:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

June 25, 1948, c. 646, 62 Stat. 957.

[8] *See Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968), *cert. denied*, 395 U.S. 908 (1969) (§ 1927 applies only to a "serious and studied disregard for the orderly processes of justice").

Blas v. Winkler, 792 F.2d 858, 860 (9th Cir. 1986) (emphasis added), *citing Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829-32 (9th Cir. 1986), *U.S. v. Blodgett*, 709 F.2d at 610, and *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 727 (9th Cir. 1984).

A majority of circuits include the recklessness prong under their § 1927 tests, and in applying it some have added helpful glosses. The Seventh and Tenth Circuits agree that while the court's sanctioning power under § 1927 must be strictly construed, it is warranted where there has been a "serious and studied disregard for the orderly process of justice." *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1163, 1167 (7th Cir. 1968), *cert. denied*, 395 U.S. 908 (1969). *See also Dreiling v. Peugeot Motors of America, Inc.*, 768 F.2d 1159, 1165 n.16 (10th Cir. 1985), and *In re TCI, Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985) (affirming § 1927 and Rule 11 sanctions on an "attorney that recklessly creates needless costs"). "An application of § 1927 sanctions follows where the district court finds that plaintiff's 'First and Second Amended Complaints were merely 'attempts to manufacture federal claims against . . . defendants where plaintiff knew or should have known that none existed.' " *Wang v. Gordon*, 715 F.2d 1187, 1190 (7th Cir. 1983).

Unlike Rule 11, a pleading does not have to be entirely frivolous for § 1927 sanctions to attach, if there is bad faith. "Some merit in counsels' actions . . . does not preclude an award under 28 U.S.C. § 1927." *Lone Ranger Television, Inc.*, 740 F.2d at 726-27. *See also Estate of Blas*, 792 F.2d at 860. *Compare* the discussion of Rule 11 and *Townsend v. Holman, Infra.* Courts may also use § 1927 to sanction an unnecessary joinder of defendants, even

when the claims against the other defendants are proper. *Glass v. Pfeffer*, 657 F.2d 252, 256 (10th Cir. 1981).

Section 1927 does not apply to initial pleadings, since it addresses only the multiplication of proceedings, and it is only possible to multiply or prolong proceedings after the complaint is filed. *In re Yagman*, 796 F.2d 1165, 1187 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987). Section 1927 sanctions have been imposed, however, on *amended* complaints that were found to unreasonably multiply the proceedings. *See, e.g., Wang v. Gordon*, 715 F.2d 1187, 1191 (7th Cir. 1983), and *Stewart v. City of Chicago*, 622 F.Supp. 35 (N.D.Ill. 1985).[9]

Under § 1927, sanctions may be imposed only against attorneys, not parties. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986). We are not aware of any published opinion in which a court has explicitly addressed whether § 1927 is a source of authority for imposing sanctions on a law firm, as opposed to an individual lawyer. While a number of federal courts have imposed § 1927 on law firms, they have done so without discussion.[10] Perhaps more important, all of these cases

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[9] *See also* M. Derfner & A. Wolfe, *Court Awarded Attorney Fees* ¶ 10.05[d] at 10-64: "[T]rial courts are not permitted to award section 1927 fees for the mere filing of a suit. . . . If a trial court is asked to assess section 1927 fees on the basis of an unmeritorious motion, *or an amended pleading*, it may apply the precise standards spelled out by the appellate courts." (emphasis added).

[10] *See, e.g., EEOC v. Milavetz and Associates*, 863 F.2d 613 (8th Cir. 1988); *Apex Oil Co. v. Belcher Co.*, 855 F.2d 1009 (2nd Cir. 1988); *In re Arkansas Communities, Inc.*, 827 F.2d 1219 (8th Cir. 1987); *Record Data, Inc. v. Schoolcraft*, 1989 U.S. Dist. LEXIS 219

were decided before the Supreme Court's very recent opinion in *Pavelic & LeFlore v. Marvel Entertainment Group*, 58 U.S.L.W. 4038 (U.S. Dec. 5, 1989), which held that the language of Federal Rule of Civil Procedure 11 authorizes courts to sanction only individual lawyers who actually sign filed papers, not law firms. The holding of *Pavelic* is based explicitly on the specific reference in Rule 11 to the "signer" of the paper, language that does not appear verbatim in § 1927. The undersigned believes, however, that the Supreme Court probably would conclude that the language of § 1927 also only authorizes imposition of sanctions on individual attorneys, not law firms. Section 1927 requires "[a]ny attorney or other *person*" who unreasonably multiplies proceedings "to satisfy *personally*" excess costs and attorneys' fees (emphasis added). Moreover, we have found no indication in the legislative history of § 1927 that Congress intended to empower courts to impose sanctions on law firms when it enacted the statute. We therefore cannot recommend that the District Court rely on § 1927 to impose sanctions on PLF itself.

C. 42 U.S.C. § 1988

Under 42 U.S.C. § 1988 a court may, in its discretion, award attorney fees to a successful defendant in a Civil

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(N.D.Ill. 1989); *Life Fitness, Inc. v. Sears Roebuck and Co.*, 1988 U.S. Dist. LEXIS 3463 (N.D.Ill. 1988); *Wold v. Minerals Engineering Co.*, 575 F.Supp. 166 (D.Colo. 1983); *Doane v. Metal Bluing Products, Inc.*, 36 Fed. R. Serv. 2d (Callaghan) 1402 (N.D.N.Y. 1983); *Monk v. Roadway Express, Inc.*, 73 F.R.D. 411 (W.D.La. 1977), *vacated on other grounds*, 599 F.2d 1378, aff'd, 447 U.S. 752; *In re O.T.M., Inc.*, No. 80-00323, slip op. (Bankr. D. Haw. 1982).

Rights Act case upon a finding either that the plaintiff's action was brought in bad faith, or was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[11] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422-23, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). However, sanctions under this statute may be imposed only on *parties* to a lawsuit, not on their lawyers. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1979). Since we have concluded, for reasons set forth *infra*, that it is not appropriate to sanction plaintiffs themselves in this matter, it is unnecessary to discuss § 1988 in detail.

D. Federal Rule of Civil Procedure 11

1. Old Rule 11

Prior to the 1983 amendments, courts imposed Rule 11 sanctions only upon a finding of subjective bad faith. *See, e.g., Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1166 (7th Cir. 1983); *Nemeroff v. Abelson*, 620 F.2d 339 350 (2nd Cir. 1980). The bad faith standard arose from the subjective focus of the old Rule:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; *that to*

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[11] As amended, 42 U.S.C. § 1988, provides in pertinent part:

> In any action or proceeding to enforce a provision of section 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

> *the best of his knowledge, information, and belief,* there is good ground to support it.
>
> Fed.R.Civ.P. 11 (1982) (emphasis added).

"[U]nder the former Rule, sanctions against the signing attorney were reserved for a 'wilful violation of this rule. . . . ' " *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986) (*citing* Rule 11). "Old Rule 11 was governed by a standard of willfulness and subjective bad faith". *In re Yagman*, 796 F.2d 1165, 1185 (9th Cir. 1986), *citing Zaldivar*, 780 F.2d at 829.

Although a majority of circuits had concluded that attorney's fees and costs could be awarded under old Rule 11,[12] the Ninth Circuit held in *United States v. Standard Oil Co.*, 603 F.2d 100, 103 n.2 (9th Cir. 1979) ["*SOCAL*"], that "Rule 11 . . . provides no authority for awarding attorney's fees against an unsuccessful litigant." Although it denied attorneys' fees under old Rule 11, the *SOCAL* court emphasized the traditional authority of courts to award fees under the bad faith exception to the American Rule, which allowed a court to act pursuant to its inherent authority upon a finding that a party or attorney had acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 103.

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[12] *See, e.g., Westmoreland v. CBS News*, 770 F.2d 1168 (D.C. Cir. 1985); *Hedison Mfg. Co. v. N.L.R.B.*, 643 F.2d 32, 35 (1st Cir. 1981); *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), cert. denied sub nom. *Coyne v. Weinberger*, 464 U.S. 818 (1983); *Perichak v. I.U.E.R.M.W., Local 601, AFL-CIO*, 715 F.2d 78 (3d Cir. 1983); *Davis v. Veslan Enterprises*, 765 F.2d 494 (5th Cir. 1985); *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370 (6th Cir. 1987); *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160 (7th Cir. 1983); *Burkhart v. Kinsley Bank*, 804 F.2d 588 (10th Cir. 1986).

Sanctions are appropriate only under the version of Rule 11 in effect at the time the attorney signed the sanctionable pleading. *Yagman*, 796 F.2d at 1185. Because the original complaint in this action was filed in 1982, it is subject to the old version of Rule 11. But since PLF and its clients filed the amended complaint on August 4, 1983, their conduct in the preparation, filing, and prosecution of that amended pleading is governed by the version of Rule 11 that became effective on August 1, 1983.

2. Amended Rule 11 (effective August 1, 1983)

As amended in 1983, Rule 11 requires the court to impose sanctions whenever it finds either that an attorney proceeded in bad faith in filing a pleading, motion, or other paper, i.e. the paper was "interposed for [an] improper purpose", or that a paper signed by an attorney (or the attorney's inquiry leading to the filing of the paper) was objectively unreasonable or "frivolous", i.e. not "well grounded in fact . . . [or] existing law or a good faith argument for the extension, modification, or reversal of existing law." *See, e.g., Stewart v. American Int'l. Oil & Gas Co.*, 845 F.2d 196, 201 (9th Cir. 1988). Thus, it would seem that either a finding of bad faith or a finding of frivolousness is sufficient to support imposition of sanctions under Rule 11. Under Ninth Circuit authorities, however, a trial court may not reach the issue of bad faith with respect to a *complaint* unless it first finds that the pleading was "frivolous" in its entirety. *Zaldivar*, 780 F.2d 823; *Townsend v. Holman Consulting Corp.*, 881 F.2d 788 (9th Cir. 1989), *en banc rehearing granted and pending*, 888 F.2d 646 (1989). The Ninth Circuit has not hesitated,

however, to affirm Rule 11 sanctions for papers *other* than complaints on the ground that they were filed for an improper purpose, even though no finding was made that they were frivolous. *See In re Itel Securities Litigation*, 791 F.2d 672, 675 (9th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987). Thus, a finding of bad faith may serve as an independent predicate for sanctions under amended Rule 11, without a finding of frivolousness, for all papers, other than complaints, filed after August 1, 1983.

Under the bad faith provision of the Rule, it is not necessary to adduce direct evidence of subjective intent; subjective intent may be inferred from circumstantial evidence. "The view is nearly unanimous that an 'improper purpose' is to be tested by objective standards." *Zaldivar*, 780 F.2d at 829.

The second provision of the Rule requires sanctions for a "frivolous" pleading, one that is "legally unreasonable, or without factual foundation, even though not filed in subjective bad faith." *Id.* at 831. The Ninth Circuit has given the term "frivolousness" an extremely demanding definition. Under *Townsend* decision, it appears that trial courts may not adjudge a complaint to be "frivolous" if, for example, nine out of ten causes of action are totally and patently meritless, but, at the time the complaint was filed, it was not clear that the tenth cause of action suffered from a blatantly fatal legal or factual infirmity. The *Townsend* court also held that when "a pleading names a *party* frivolously . . . [such] improper inclusion of a party in a complaint which properly includes other parties . . . cannot render the complaint frivolous for purposes of Rule 11 sanctions." *Townsend*, 881 F.2d at 795.

As noted *supra*, the Supreme Court has recently held that Rule 11 sanctions may be imposed only on the individual attorney who signs the offending pleading, not on the attorney's law firm. *Pavelic & LeFlore v. Marvel Entertainment Group*, 58 U.S.L.W. 4038 (U.S. Dec. 5, 1989).

V. APPLICATION OF SANCTIONS LAW TO THIS LITIGATION

In recommending whether plaintiffs or PLF should be sanctioned, it was necessary for this court to closely examine the record to determine whether any claims asserted against any of the defendants here seeking fees were legally unreasonable, frivolous, or without factual foundation, and whether part or all of PLF's conduct during the course of this litigation was in bad faith or unreasonably multiplied the proceedings. We first discuss the legal predicates and factual support in the record for each of plaintiffs' major claims for relief brought in the two complaints. Second, we focus on the factual foundation presented by PLF supporting the claims against each of the individual director defendants. Finally, we examine the conduct of PLF attorneys in prosecuting this litigation after the action was filed.

A. Legal and Factual Merits of Plaintiffs' Claims For Relief

1. Taking Claims of the Lockarys, Gilberts, and Macey

Plaintiffs Lockarys, Gilberts, and Macey alleged in the third and fourth causes of action of the amended

complaint that BCPUD and four director defendants, Kayfetz, LeMieux, McClellan, and Farnsworth, have used the water emergency and moratorium to take their property without just compensation. PLF was essentially asserting a "regulatory taking" theory; defendants sought to "control land use through the maintenance of a sham, self-imposed 'emergency' ", which has "resulted in a de facto downzoning of plaintiffs' property to open space." Amended Complaint at ¶ 93. Plaintiffs alleged that while defendants had a statutory duty to provide water, they maintained a "sham" water emergency—by condoning "extraordinary water consumption" by existing users, by not taking steps to develop potential water sources or encourage conservation, and by undertaking property transactions that limited the development of potential water source sites--all for the purpose of restricting property development and controlling growth. *Id.* at ¶ 70, 71, 74, 77, 78, 85, 88-91. These actions allegedly precluded plaintiffs from making any reasonable use of their property ("makes plaintiffs' land valueless and useless"), and were "not reasonably related to any legally permissible concerns" of the district. *Id.* at ¶ 67, 74, 81, 88, 90, and 94.

A landowner clearly has a cause of action under a regulatory taking theory if it can show that the challenged land use regulation denies it *all* economically viable use of its land. The Supreme Court also has suggested, unclearly, that land use regulation must face another, independent test: if the regulation does not "substantially advance [a] legitimate state interest", it may constitute a taking, perhaps even if it does not destroy *all* economically viable use of the property in question. *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141,

65 L.Ed.2d 106 (1980); *see also Nollan v. California Coastal Commission*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3146, 97 L.Ed.2d 677 (1987). PLF argues, with some support from the Supreme Court, *see Nollan*, 483 U.S. at 834, n.3, that this "substantial advancement" test is stricter than the rational basis standard ordinarily applied in constitutional challenges to economic regulation under substantive due process and equal protection norms. Supplemental Opposition to Summary Judgment on Inverse Condemnation and Due Process Claims, Dkt. No. 398 at 3-4.

While PLF's *pleadings* were not at all clear on this matter, in the *briefs* it filed here PLF has suggested that plaintiffs intended to invoke both tests. PLF asserted, first, that the moratorium destroyed all viable economic use of plaintiffs' property (since plaintiffs were denied a water permit necessary for residential development), and, second, that the moratorium did not advance a legitimate state interest (since there was no actual water shortage, and since under California law a public utility is not empowered to pursue growth control objectives). Opposition to Summary Judgment on Inverse Condemnation and Due Process Claims, Dkt. No. 382 at 1-5; Supplemental Opposition to Summary Judgment on Inverse Condemnation and Due Process Claims, Dkt. No. 398 at 4.

The record presented to this court, i.e. the briefs and exhibits submitted during the course of the substantive litigation and the sanctions motion, is devoid of factual support for the contention that plaintiffs were left with no viable economic use for their land as a result of the moratorium. PLF has presented no evidence in support of its assertion that plaintiffs lost all property value when

their water permit applications were denied, or that none of the plaintiffs had alternative means of obtaining water besides a BCPUD hookup, for example drilling wells, trucking water, forming their own water district, etc.[13], which could possibly support residential development or some other viable economic use of the property.

We must conclude, however, that plaintiffs' regulatory taking claim based on the "substantial advancement" theory was not factually unsupported or legally frivolous, and thus we cannot recommend that sanctions be imposed for asserting the taking claim of the Lockarys, Gilberts, and Macey. PLF arguably stated a legally cognizable regulatory taking action when it alleged that the restrictions on the use of plaintiffs' real property imposed by the moratorium constituted a taking because the moratorium did not substantially advance a legitimate governmental interest.

PLF's theory seems to have been that since the water emergency was a "sham", the moratorium could not plausibly be justified as advancing the stated governmental purpose of conserving Bolinas' depleted water supply. PLF also seems to be arguing that, since land use planning is not a "legitimate" (i.e. statutorily authorized)

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[13] *See* defendant Kayfetz' Reply Memorandum to Opposition to Dismiss, Dkt. No. 90 at 32: "Plaintiffs nowhere claim that BCPUD is the *only* possible source of water to serve their purposes . . . The plaintiffs nowhere describe any efforts they have made to obtain water from other sources, either through the formation of an additional adjoining water district or through the construction of wells or approaches to private water companies."

function of a public utility like BCPUD, a water moratorium imposed by BCPUD for a "land use" (i.e. not water-related) purpose, such as limiting urbanization or preserving small town character, cannot advance a *legitimate* state interest.

PLF has presented evidence to support plaintiffs' claims that the water emergency was a "sham"[14], that BCPUD "refus[ed] to utilize existing supplementary sources of water available to the district"[15], and that

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[14] *See, e.g.*, Exhibit A(1) to Amended Opposition to BCPUD's Motion for Fees (letter to county grand jury in which former maintenance manager for BCPUD disputes the existence of a water shortage and describes efforts by defendant Kayfetz to silence him); Exhibits A(6) and C(4) to *id.* (deposition and declaration of former maintenance manager testifying that moratorium was unnecessary and used to prevent development); Exhibit C(2) to *id.* (deposition by Duncan (qualifications unknown), testifying that the water supply in Bolinas was sufficient); Stroeh Declaration, Dkt. No. 387 (conclusion of water engineer that BCPUD has excess water storage capacity, and that existing water supplies are adequate to support growth); Exhibit C(3) to Amended Opposition to BCPUD's Motion for Fees (declaration of Bolinas property owner that water was going to second units, and that it was "common knowledge" that the moratorium was designed to prevent development); Exhibit C(8) to *id.* (report from Van Dusen that water supplies were full the day BCPUD "closed the town").

[15] *See, e.g.*, Exhibit C(7) to Amended Opposition to BCPUD's Motion for Fees (letter from Duncan stating BCPUD's agreement not to build reservoirs on certain property); Answers to Defendants' Interrogatories, Dkt. Nos. 269, 270, 271, and 277, and Amended Opposition to Director Defendants' Motions for Fees at 6 and 9 (allegations that defendants Schell and Niman "usurp[ed] . . . one of the last possible sites for a water reservoir [the Brunnell property] for their own use", and that defendants Schell, Weston, and Harris failed to exercise options on the

BCPUD "approv[ed] and maint[ained] . . . extraordinary water consumption" by current users.[16]

PLF also has presented evidence to support plaintiffs' claim that the moratorium was instituted and maintained for growth control purposes.[17] PLF presumably offered

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"Vierra" property, a possible water source site, and agreed to a deed restriction on the property foreclosing use of the site for reservoir purposes); Gilbert Declaration, Dkt. No. 383 at 3 and Exhibit B (allegations that BCPUD "voluntarily relinquished diversion rights on Pine Gulch Creek", claimed to be an important source of water in past drought years). *See generally* Opposition to Summary Judgment Against Holter/Mesa Ranch Plaintiffs, Dkt. No. 381 at 14-16.

[16] *See, e.g.*, Stroeh Declaration, Dkt. No. 387 (opinion of water engineer that water delivery has increased 67% since the moratorium, and that leakage rates were well above average in Bolinas); Exhibit C(4) to Amended Opposition to BCPUD's Motion for Fees (allegation by former BCPUD maintenance manager of "expanded" water use by existing residents); Exhibit C(3) to *id.* (allegation of Bolinas property owner that BCPUD has not imposed conservation measures on Bolinas residents); *Id.* at 32, and Exhibit A(14) to *id.* (list of 21 expanded water permits given by BCPUD to Bolinas residents). PLF also cites, in its responses to individual defendants' interrogatories, various votes by the BCPUD directors approving expanded water permits and permits for second units.

[17] *See, e.g.*, Amended Opposition to BCPUD's Motion for Fees at 37 (excerpts from defendant Schell's book re growth control purposes of moratorium); *id.* at 109-120 (statements by various defendant directors at a BCPUD water workshop); Exhibit A(8) to *id.* (campaign literature of defendants LeMieux, Kayfetz, and McClellan calling for "[c]ontinuance of the moratorium on new water hook-ups until a legally foolproof method for gradual growth is established"); Exhibits A(42), A(43) and A(44) to id. (various campaign statement by defendants addressing growth issues); Exhibit A(34) to *id.* (letter from

this evidence to show that the moratorium could not substantially advance a legitimate state interest, since BCPUD did not have the police power under state law to pursue growth control ends.

Defendants argued in their motion for summary judgment that since plaintiffs, as potential water users, did not have a property entitlement to a water hookup under California law (*Swanson v. Marin Municipal Water District*, 56 Cal. App. 3d 512, 128 Cal. Rptr. 485 (1976), *Hollister Park Inv. Co. v. Goleta County Water District*, 82 Cal. App. 3d 290, 147 Cal. Rptr. 91 (1978), and *McMillan v. Goleta Water District*, 792 F.2d 1453 (9th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987)), they had no property interest that could be "taken." Memorandum in Support of Motion for Summary Judgment on Inverse Condemnation and Due Process Claims, Dkt. No. 367. PLF countered that this argument misconstrued its claim: the amended complaint, it says, does not assert that

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BCPUD to county counsel asking for legal opinion re legality of imposing a growth limit); Exhibit A(36) to *id.* (letter to county supervisor from BCPUD expressing opposition to growth); Exhibit A(37) to *id.* (statement by defendant Weston in undated news article that "we will continue to regulate growth through utilities"); Exhibit A(40) to *id.* (statement by Weston in a letter to the editor describing moratorium as a "planning measure" related to growth); Exhibit A(41) to *id.* (statements in LAFCo staff report re BCPUD's role as "principal governmental agency" in Bolinas, and BCPUD's statement that "BCPUD community opposes development"); Exhibit A(47) to id. (statement by defendant Kayfetz in letter to the editor (undated and uncited) linking water permit allocation and "local control" over growth); Exhibit B(P) to *id.* (article by defendant Kayfetz advocating using moratorium as means to control growth).

plaintiffs had a property right to *water*, only a property right to make economic use of their *real property*. Opposition to Summary Judgment on Inverse Condemnation and Due Process Claims, Dkt. No. 382. The District Court found plaintiffs' position unpersuasive[18], and dismissed the takings claims.

Defendants now argue in this motion for sanctions that "plaintiffs' continued pursuit of their inverse condemnation claims in the face of dispositive Ninth Circuit and California precedent was legally unreasonable".[19] The undersigned concludes that, although its action was ultimately unsuccessful, PLF made a non-frivolous effort to distinguish its claim from the *Swanson* line of inverse condemnation cases. PLF throughout this action has emphasized that it was challenging the moratorium as a

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[18] "In the instant case, what plaintiffs are really suing for, despite their protestations to the contrary, is the cumulative right to use the land which they already possess *plus* the right to have water upon the land. Any alleged interference with plaintiffs' use of the land would flow from interference with the acquisition of water rights. Plaintiffs are still free to use and to sell the land or to develop it to the extent they can without water from BCPUD." Order Granting Defendants' Motions for Summary Judgment, Dkt. No. 457 at 8.

[19] It seems odd that this supposedly-dispositive legal issue was not raised earlier by defendants as part of their motion to dismiss for failure to state a claim (except for a passing reference in defendant Kayfetz' motion in the context of inverse condemnation as a remedy), but was first raised at the summary judgment stage four years after the amended complaint was filed. Since this argument apparently did not occur to defendants for the first four years of this action, the undersigned cannot conclude that the issue should have been obviously dispositive to plaintiffs when they filed their complaint.

de facto zoning regulation under a regulatory taking theory, not claiming inverse condemnation damages for loss of plaintiffs' water rights. *See, e.g.*, Amended Complaint at ¶ 93; Opposition to Summary Judgment on Inverse Condemnation and Due Process Claims, Dkt. No. 382 at 2.

We emphasize that we are not concluding that PLF's takings case was meritorious. It is certainly questionable whether a public utility's refusal to extend municipal services is conceptually analogous to a land use restriction, such as a zoning ordinance.[20] Moreover, it is not at all clear that under current takings law the "substantial advancement" test is independent of the "destruction of value" question. The strength of plaintiffs' proffered evidence on this issue is also open to question. However, it would not be appropriate to sanction plaintiffs or their counsel for attempting to capitalize on an underdeveloped area of legal doctrine, or for seeking to modify existing law, especially in murky and unsettled areas like takings that involve "complex constitutional questions . . . not easily resolved", *Parks v. Watson*, 716 F.2d 646, 664 (9th Cir. 1983), or "new and changing principles of constitutional law", *Colombrito v. Kelly*, 764 F.2d 122, 132 (2nd Cir. 1985).

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[20] In the former, the locality is directly reducing property value by limiting the range of a property's permissible uses, while in the latter the locality can only be accused of failing to enhance a property's value and utility through inaction. There is a conceptual difference between claiming a constitutional right to *stop* the government from *restricting* the use of one's property, and a right to *force* the government to *enhance* the value of one's property by extending services upon demand.

The undersigned seriously doubts the claim of the Lockarys and Mr. Macey that they purchased their property with a reasonable expectation to develop residential use, Amended Complaint at ¶ 38, in view of the fact that these plaintiffs bought their land seven to nine years after the moratorium was first enacted. However, we cannot condemn as factually frivolous these plaintiffs' assertions that they purchased the property in the belief that the moratorium would be lifted in the near future, as soon as BCPUD took steps to improve its water supply and the community plan was adopted. Exhibits C(5) and C(6) to Amended Opposition to BCPUD's Motion for Fees. Similarly, while Mr. Gilbert strains our credulity when he claims that he was unaware, over a nearly sixteen year period, that he was eligible for a water meter under a grandfather exception, Gilbert Declaration, Dkt. No. 383 at 2, we cannot find that this assertion is patently implausible.

2. Inverse Condemnation Claims of Mesa Ranch and Holter

In the eighth claim for relief in the amended complaint, plaintiffs Holter and Mesa Ranch brought an inverse condemnation claim against BCPUD and directors Kayfetz, LeMieux, Farnsworth, and McClellan. The exact nature of this claim has proven to be elusive.

PLF has obscured the issues relating to Mesa Ranch/Holter's claims throughout this litigation on a number of fronts. In the amended complaint and other papers, PLF asserted that the central wrong defendants committed was making "representations . . . to permitting agencies

for the purpose of reducing the value of plaintiffs' property so as to pave the way for its acquisition . . . at an artificially low . . . price." Amended Complaint at ¶ 135. *See also* Amended Opposition to BCPUD's Motion of Fees at 64.[21] In other papers, by contrast, PLF denied that defendants' "representations" were at issue: "The few remaining defendants are *not* being sued because they spoke out on political issues or advocated no growth policies to other government agencies. . . . The claims against these defendants rest on their actions in maintaining the unlawful moratorium not on their actions communicating the existence of the moratorium to other government officials or agencies." Reply to Defendants' Motion to Dismiss, Dkt. No. 355 at 1-2 (emphasis in original). In still other papers, PLF cited both the representations to agencies and defendants' "wide public distribution of BCPUD's intent" to acquire the property (i.e. sending copies of BCPUD correspondence to newspapers) as proof that defendants were involved in "widespread conduct" to "hold the Mesa Ranch property in limbo to facilitate acquisition by BCPUD for the least possible cost." Opposition to Motion for Summary Judgment Against Mesa Ranch and Holter, Dkt. No. 381 at 8.

PLF has also been inconsistent in identifying its theory of defendants' underlying motive for lobbying against Mesa Ranch development. In the amended complaint, PLF alleged that the BCPUD defendants took their

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[21] "This cause of action was alleged *only* against BCPUD, Kayfetz, LeMieux, Farnsworth, and McClellan. Why? Because they urged disapproval of plaintiffs' development project as BCPUD officials."

action with no intention of ever condemning the property: "At the time the public statements were made, defendants herein acted with knowledge that there was no intention to condemn." Amended Complaint at ¶ 137. In opposing summary judgment, PLF claimed that defendants *did* intend to condemn the property, for use as a reservoir: "BCPUD . . . caused a de facto precondemnation taking by engaging in unreasonable and oppressive conduct *for the purpose of artificially depressing the value of the Mesa Ranch property prior to acquiring it as a water reservoir site.*" Opposition to BCPUD's Motion for Summary Judgment against Mesa Ranch and Holter, Dkt. No. 381, at 1 (emphasis added).[22] In its papers opposing sanctions, PLF once again shifted ground; here it claimed that BCPUD's "true purpose" was to acquire Mesa Ranch as open space, and that the district's stated intent to use the land for a reservoir site was just a ruse: "[BCPUD's] true purpose was to defeat any and all development . . . and acquire [Mesa Ranch] as an open space buffer between the community and the Pt. Reyes National Seashore." Amended Opposition to BCPUD's Motion for Fees at 51.[23]

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[22] This theory also blatantly contradicts plaintiffs' claims elsewhere that BCPUD studiously *avoided* pursuing new water sources; here plaintiffs charge that BCPUD directors went out of their way devising schemes to grab the Holter property for a reservoir site.

[23] PLF compounds the confusion by referring to plaintiffs' action interchangeably as a "precondemnation de facto taking" claim and as a "*Klopping* claim", Opposition to Summary Judgment, Dkt. No. 381 at 3-4, and Opposition to BCPUD's Motion for Fees, at 49, not recognizing that in *Klopping* itself the court made a distinction between a "precondemnation de facto

PLF also denies that it ever asserted a regulatory taking theory for Mesa Ranch, although the amended complaint did allege denial of *all* reasonable economic value, an element of a regulatory taking claim but not of a "precondemnation blight" claim (where *any* decrease in value is actionable). Amended Complaint at ¶¶ 133 and 138. Apparently PLF decided to drop its destruction of value claim in view of the subsequent sale of Mesa Ranch to the federal government for over $1 million.

PLF continued to muddy the waters at the summary judgment stage by asserting regulatory takings and substantive due process actions in reference to the one acre of Mesa Ranch within the boundaries of the district.[24]

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taking" and the issues in that case: "In de facto taking cases, the landowner claims that because of particularly oppressive acts by the public authority the 'taking' actually has occurred earlier than the date set by statute. . . . The prevailing rule . . . is that before a de facto taking results there must be a 'physical invasion or direct legal restraint'. . . . One example of a 'legal restraint' . . . has been a particularly harsh zoning regulation, often calculatingly designed to decrease any future condemnation award." *Klopping v. City of Whittier*, 8 Cal. 3d 39, 46, 104 Cal. Rptr. 1 (1972). By contrast, the *Klopping* court was faced with an allegation of adverse precondemnation *publicity*, not adverse *regulation*, by the condemning agency that resulted in depressed value. Plaintiffs here seem to be arguing both theories: that the property was "taken" when the various permitting agencies (spurred on by BCPUD's protests) turned down Mr. Holter's development applications, and that BCPUD publicized its intent to condemn so as to depress value.

[24] PLF asserts that the civil rights, conspiracy, temporary taking, and declaratory relief causes of action in the amended complaint made this claim, although no facts specific to Mesa Ranch are pleaded there. It is also curious that the Mesa Ranch/Holter plaintiffs were not joined in the primary regulatory taking, due process, or equal protection causes of action.

PLF argued that this land was taken by the moratorium (even though it already had a water meter), since a "limitation on the number of animals [grazing on the land] was imposed by BCPUD in direct reliance on the moratorium". Opposition to BCPUD's Motion for Summary Judgment against Mesa Ranch and Holter, Dkt. No. 381 at 13.

This court must conclude that the obfuscatory and inconsistent manner in which PLF presented this claim throughout the course of this litigation was deliberate, not merely a product of sloppy lawyering. This inference is supported in part by PLF's abundant self-professed expertise in property rights litigation. Moreover, PLF conveniently shifted ground when it was faced with adverse facts or legal doctrine. PLF began denying that defendants' lobbying was the basis for the Mesa Ranch claim when faced with a potent First Amendment defense, abandoned the claim of destruction of use after Mesa Ranch was sold for over $1 million, and abandoned (at least temporarily) their theory that BCPUD intended to acquire Mesa Ranch for a reservoir when the inconsistency between this allegation and PLF's portrait of defendants as hostile to new water sources became glaring. From all the circumstances, we infer that subjective bad faith inspired the way that PLF presented this claim, and we recommend that PLF be held liable for monetary sanctions under the Court's inherent sanctioning authority. The protean nature of the Mesa Ranch inverse condemnation cause of action needlessly and unreasonably multiplied and confused the proceedings, against the interests of defendants, defendants' counsel, and the District Court. The undersigned recommends that sanctions

be imposed here against the PLF firm, which, as sponsor of this lawsuit and self-professed "quality control" monitor over the litigation, was the entity most responsible for the strategy of presenting a "moving target" cause of action. While many of the same individual PLF attorneys were listed on most or all of the documents cited above[25], it is difficult for the undersigned to point to the specific PLF attorneys responsible for the obfuscations.

While the court finds the manner of presenting the inverse condemnation claim sanctionable, we cannot conclude that the claim itself was patently "frivolous" as that term has been so stringently defined in this Circuit. A generous reading of at least some of plaintiffs' allegations, in the context of cases like *Klopping v. City of Whittier*, 8 Cal. 3d 39, 104 Cal. Rptr. 1 (1972), *Jones v People ex rel. Department of Transportation*, 22 Cal. 3d 144, 148 Cal.Rptr. 640 (1978), and *Richmond Elks Hall Assoc. v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), could support a conclusion that the Mesa Ranch plaintiffs had a basis for a cause of action for inverse condemnation arising out of defendants' allegedly oppressive precondemnation behavior.[26] PLF has presented a variety of evidence showing that BCPUD was

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[25] The listed attorneys on the amended complaint were Ms. Ruiz, Mr. Hughes, and Mr. Zumbrun. The listed attorneys on both the reply to the motion to dismiss (Dkt. No. 355), and the opposition to summary judgment against Mesa Ranch and Holter (Dkt. No. 381) were Robert Best, Mr. Zumbrun, and Mr. Finch. The listed attorneys on the amended opposition to fees were Richard Stephens, Mr. Zumbrun, and Mr. Finch.

[26] *Klopping* held that precondemnation publicity or other oppressive conduct prior to condemnation by an agency that depresses property value can be actionable. *Jones* held that a

interested in obtaining the Mesa Ranch property for a reservoir and had taken some steps (e.g. obtained a state Clean Water Grant) to pursue that purpose through eminent domain. *See* Opposition to Motion for Summary Judgment Against Mesa Ranch and Holter, Dkt. No. 381 at 6-7 and Opposition to BCPUD's Motion for Fees at 51-62 for a discussion and a list of citations to evidentiary exhibits. While Judge Williams found that these actions did not amount to the "firm declaration of intention to condemn" required by *Klopping*, Order Granting Summary Judgment, Dkt. No. 457 at 11-12, the point was sufficiently arguable to persuade the undersigned that it is not appropriate to attach the label "frivolous" to this cause of action.

There is also evidence that BCPUD and individual defendants, acting in their capacity as BCPUD directors, made "representations" to other agencies opposing development of Mesa Ranch, pointing to the water emergency and the designation of the site for a future reservoir as the reason for opposition.[27] Moreover, plaintiffs

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property owner could sue one governmental agency (there, the state transportation agency) for inverse condemnation when another agency (there,the county) relied on the condemning agency's precondemnation designation to deny the owner permission to develop. *Richmond Elks* is a Ninth Circuit case that also permitted an action for inverse condemnation for adverse precondemnation conduct.

[27] *See* Exhibit D to Harris Declaration, Dkt. No. 365 (letter from BCPUD to the California Coastal Commission opposing Mesa Ranch's proposed amendment to the local coastal plan; Exhibit E to *id.* (requests to speak before Coastal Commission regarding coastal plan amendment, signed by defendants Kayfetz, LeMieux, and McClellan on behalf of BCPUD);

have pointed to some evidence that the Coastal Commission relied in part on BCPUD's wishes in denying Mr. Holter's application.[28]

Direct evidence is notably lacking in the record to support plaintiffs' key claim that defendants made these representations for the purpose of depressing the value of Mesa Ranch in anticipation of condemnation. However, it would not have been clearly unreasonable for plaintiffs to ask a court to infer that BCPUD was motivated by its desire to keep future acquisition costs down, since BCPUD would still have the power to condemn Mesa Ranch for reservoir use even after the property was developed. Comments by the county planning director lend some support to this theory: "Although the Local Coastal Program does mention the property as a possible reservoir site for the [BCPUD], such a designation is not

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Exhibit Q to Finch Declaration, Feb. 10, 1989 (protest letter and supplement from BCPUD to the State Water Resources Control Board opposing proposed dam on Mesa Ranch site); Exhibit P to *id.* (letter to state assemblyman from BCPUD opposing Mesa Ranch development).

[28] *See* Exhibit C to Harris Declaration, Dkt. No. 365 (Commission staff report recommending denial of application stating that "a designated potential site for such a reservoir is the Mesa Ranch property. Increasing the permissible level of development on the Mesa Ranch property could foreclose planning options regarding the placement and sizing of the reservoir which is needed to serve the community."). However, PLF's own investigator admits that Mr. Holter was offered the opportunity to resubmit his application in exchange for certain (unspecified) conditions, "but he did not pursue this". Exhibit 14 to Finch Declaration, March 31, 1989 (memo from Todd to Ruiz).

included as a policy because it is not legal to limit development for this purpose, inasmuch as the public agency has the ability to acquire all or a portion of the [property] for such a public purpose." Exhibit A to Holter Declaration, Dkt. No. 389.

While there are statements in the record to the effect that BCPUD directors wanted the Holter land to act as a buffer between the National Seashore and the town, we have seen no credible evidence to support plaintiffs' last-minute contention (surfacing for the *first* time in the post-litigation briefing on this sanctions motion) that BCPUD's goal in seeking to acquire the property was simply to preserve open space, not to develop a reservoir. Indeed, this charge is flatly contradicted by PLF's own factual presentation that BCPUD devoted extensive work to applying for grants from the state to acquire the site for a reservoir and that defendants repeatedly discussed plans for developing a reservoir on the site.

PLF has presented some evidence that Mesa Ranch suffered a reduction in value and other economic injury as a result of the moratorium and defendants' efforts to block its development.[29] PLF also asserts in its fees opposition (without supporting documentation) that Mr. Holter's property sold for less than neighboring comparable

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[29] See Exhibit B(T) to Amended Opposition to BCPUD's Motion for Fees (Holter declaration alluding to 1982 appraisal setting the property's value at $1.6 million, which sold for $1.1 million in 1984); Exhibits S, U, and V to Holter Affidavit, February 25, 1983, reproduced as Exhibit A to BCPUD's Status Conference Statement, Dkt. No. 350 (loan rejection letters from several banks to Holter).

property. Amended Opposition to BCPUD's Motion for Fees at 62.

We also find that plaintiffs' secondary claim alleging a regulatory taking and substantive due process violation with reference to the one acre parcel of Mesa Ranch that was within BCPUD jurisdiction was not completely baseless. PLF has raised an argument, which is not patently implausible, that Mr. Holter was restricted in his use of this one acre of grazing land by BCPUD, and that the existence of the moratorium may have contributed to the imposition of this use restriction. Exhibits B and C to Finch Declaration, February 10, 1989. Thus, under regulatory taking and substantive due process theories, it would not be frivolous to argue that plaintiffs suffered injury from the actions of defendants in enacting and maintaining a "sham" moratorium that did not "substantially advance a legitimate government interest" or was "irrational", despite the fact that the property was served by a BCPUD water meter and despite the fact that the value of the property had not been totally destroyed.

Defendants argue that the Mesa Ranch inverse condemnation claim was frivolous because "Mesa Ranch could not logically maintain that a BCPUD moratorium on new water hookups within the District caused a 'taking' of its property outside the District." Memo in Support of Fees Under § 1927 at 42. We believe this misconstrues the essence of Mesa Ranch's claim. There is no reason why an inverse condemnation action based on a "precondemnation blight" theory (as opposed to a regulatory takings theory) cannot be brought for land outside a governmental entity's borders, if that entity has the power to acquire that land through condemnation.

BCPUD's power of condemnation over the Mesa Ranch property has not been disputed in this case.

Defendants also place great emphasis on their First Amendment defense. They argue that since their representations to permitting agencies were simply petitioning activities clearly protected under the First Amendment, plaintiffs could not plausibly base a claim for compensation on these representations. Defendants rely most heavily on *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980), and *Racetrac Petroleum, Inc. v. Prince George's County*, 601 F.Supp. 892 (D.Md. 1985), *aff'd*, 786 F.2d 202 (1986), to support their claim of an immunity from civil rights claims for First Amendment activities. Plaintiffs counter that the BCPUD directors, acting as officials and not as private citizens, are not immunized from all liability by the First Amendment.

This court cannot conclude that PLF's position with the respect to the First Amendment is clearly frivolous. In *Gorman* and *Racetrac*, First Amendment immunity was found only in the context of the lobbying actions of purely private citizens (a group of landowners opposing development in *Gorman*, and an association of retailers in *Racetrac*). Here it is alleged that defendants made their representations at least in part on behalf of BCPUD in their capacity as directors. As the *Klopping* decision exemplifies, governmental entities (and perhaps, by implication, individual officials) *can* be held liable for the content of their speech.

Finally, defendants argue that PLF's inverse condemnation claim must be deemed frivolous on its face in view of the subsequent sale of Mesa Ranch for over $1 million.

However, sale for value is not dispositive in disproving injury under a *Klopping*-style precondemnation taking theory, since under that theory, a plaintiff landowner must show only *impairment* of value, not *destruction* of value.

3. Substantive Due Process Claims

In the fifth cause of action in the amended complaint, the Lockarys, Gilberts, and Macey claimed that BCPUD and directors Kayfetz, LeMieux, Farnsworth, McClellan, Amoroso, Niman, Schell, Harris, and Weston (as well as four other directors not seeking sanctions) kept their property "arbitrarily, wrongfully, and unlawfully restricted in its use and development and in effect set aside for open space for the use and benefit of the public in violation of plaintiffs' right to substantive due process."

Although the substantive due process claim was never independently developed by PLF in the record, it appears that the factual core of its claim that the water moratorium was arbitrary because the water emergency was a "sham" largely duplicates PLF's regulatory taking claim. Forty years of Supreme Court hostility to economic claims based on substantive due process clearly made this cause of action more dubious on the legal merits than the theoretically distinct taking claim. However, in the last few years there has been some subtle erosion of the judiciary's resistance to substantive due process claims as the balance between political control of legislative and judicial bodies has shifted. Recently, some courts have

redirected, in some measure, the thrust of judicial activism toward protecting economic interests against harms allegedly imposed indirectly by legislative bodies. This has led to some strengthening of the traditionally deferential rational basis standard applied against property rights claims. *See Nollan,* 483 U.S. at 841 ("We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."); *Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985) (statute taxing out-of-state insurance companies at higher rate violated equal protection clause because it served no legitimate state interest); *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (zoning ordinance that required use permit for group home for the mentally retarded, but did not require permit for other group homes, violated equal protection clause because it was irrational); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (statute barring claims of employment discrimination scheduled for administrative hearing by administrative agency after statute of limitation period had run violated equal protection because the classification it established was "patently irrational"); *Sinaloa Lake Owners Association v. City of Simi Valley,* 882 F.2d 1398, 1408-09 (9th Cir. 1989) ("But the fourteenth amendment's due process clause protects property no less than life and liberty. . . . To the extent that arbitrary or malicious use of physical force violates substantive due process, there is no principled basis for exempting the arbitrary or malicious use of other

governmental powers from similar constitutional constraints").[30] *See also* Karlin, *Back to the Future: From Nollan to Lochner,* 17 Sw.U.L.Rev. 627 (1988). Given this subtle shift, we cannot hold that it was sanctionable for PLF to try to capitalize on or accelerate this movement of what had been well established legal doctrine.

4. Equal Protection Claims

Plaintiffs Lockarys, Gilberts and Macey alleged in the sixth claim for relief in the amended complaint that BCPUD and directors Kayfetz, LeMieux, Farnsworth, McClellan, Amoroso, Niman, Schell, Harris, and Weston (as well as four other directors not seeking fees) "have acted so as to insure that the benefits of the district will inure only to those who owned developed property [before the moratorium], all to the detriment of those who did not possess developed land on said date". Amended Complaint at ¶ 113. Specifically, plaintiffs alleged that defendants failed to impose conservation measures to prevent water waste, "adopted and sanctioned" the use of illegal connections by second units (with the intent of preventing development of undeveloped property by perpetuating a water shortage), and enforced the moratorium unequally in favor of owners of developed property.

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[30] *Sinaloa Lake Owners* arguably strengthened the rational basis standard in property rights cases when the government invokes its emergency police powers to justify its actions. This further supports the conclusion that a substantive due process challenge to the moratorium, while a long shot, was not clearly frivolous.

Defendants make the unassailable point that the equal protection clause is not violated simply because differently-situated parties are treated differently, if there is a rational basis for the distinction. Of course, plaintiffs were free to argue that there was no rational basis to BCPUD's differential treatment.

PLF had no obligation to show a property interest by plaintiffs in *water* to make out an equal protection claim. They needed to show only some constitutionally cognizable interest of plaintiffs that was adversely affected by defendants' allegedly discriminatory acts. Thus, the only question here is whether the government has treated parties equally, and if not, whether plaintiffs could show that there was no rational basis for the disparate treatment.

PLF has presented sufficient factual support for its allegation of unequal treatment by BCPUD of property owners who already had water hookups and property owners who did not have hookups.[31] Thus the question

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[31] *See e.g.*, Exhibit A(10) to Amended Opposition to BCPUD's Motion for Fees (statements by hearing officer in minutes to unidentified 1987 meeting that there is "favoritism" and "lack of equity" in BCPUD water allocation; Exhibit A(23) to *id.* (allegations in newspaper article that defendant Kayfetz had personally received favored treatment from BCPUD); Exhibit C(4) to *id.* (declaration of former BCPUD maintenance manager alleging "expanded" water use by existing residents); Exhibit C(3) to *id.* (declaration of Bolinas property owner that water was going to second units); Exhibit A(24) to *id.* (allegations by county building inspector of differential treatment of outsiders versus residents in granting water permits). See also the responses to individual defendants' interrogatories, in which plaintiffs list various votes by defendant directors to

becomes was it legally unreasonable for plaintiffs to claim that they could show that there was no rational basis for this differential treatment? Again, recent cracks in the judicial dike that had held back interference by courts with the way other branches of government regulated economic interests appear to be wide enough to enable PLF to escape sanctions for pleading this theory. PLF argues that the only real purpose of the declaration of a water emergency and the moratorium was to block development, since there was no actual shortage of water. And since there was no real water shortage, PLF argues, the decisions that BCPUD rationalized on the basis of the water emergency were grounded in nothing at all thus--having no rational basis. While this conceptually facile approach would force courts to second-guess legislative motives even when only economic interests are at stake, something that courts had refused to do under the equal protection or due process clauses for decades, we cannot say, given recent signs of doctrinal irresolution, that it was obviously legally unreasonable for PLF to seek relief for plaintiffs under an equal protection theory.

5. Civil Rights Conspiracy Claims

In the eleventh cause of action in the amended complaint, all plaintiffs alleged that all individual defendants entered into agreements "to develop and implement a conspiracy to permanently deny plaintiffs all reasonable

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legalize second units and approve expanded water permits for existing uses.

use of their property", Amended Complaint ¶ 149, in order to gain the benefit of the property without just compensation. Plaintiffs alleged that this taking occurred through "a series of covert acts", including limiting future water sources and allowing "increased illegal water consumption" by existing residents. This conspiracy, they allege, has worked in fact to deny plaintiffs all reasonable economic use of their property.

PLF's conspiracy cause of action stands or falls, first, on the legal and factual merits of its substantive causes of action, i.e. takings and inverse condemnation, and, second, on its ability to prove that the constitutional violations occurred pursuant to an agreement. We have explained above why we cannot hold that the legal theories involved here were patently frivolous. As to factual support, the only *direct* evidence this court can find in the record that might tend to prove a conspiratorial agreement between directors to deprive plaintiffs of their property rights is a statement by a waitress that before the moratorium was enacted she overheard defendant Kayfetz and (unidentified) others say that the moratorium was "the best way to close the town". Exhibit 24 to Finch Declaration Re Prefiling Inquiry (memo from PLF investigator). This evidence seems very unreliable and of little probative value to PLF's case. The fact that some of the defendants jointly based their election campaigns for the BCPUD board on an antigrowth platform does support a conspiracy claim to some extent, however.

PLF all but admits that it had only circumstantial evidence to support its claim that defendant directors entered into an agreement to deny plaintiffs their constitutional rights. In the case of the Lockarys, the Gilberts,

and Mr. Macey, this mainly consists of evidence (cited above in the taking section) that BCPUD directors approved expanded water use for existing residents, denied water permits to nonresidents, failed to exploit opportunities to increase the water supply, and engaged in real estate transactions whose effect may have been to compromise BCPUD's future ability to generate new sources of water. In the case of plaintiffs Mesa Ranch/ Holter, this would be evidence (cited above in the inverse condemnation section) that the four directors made "representations" to other agencies in order to blight the value of Mesa Ranch.

Given the fact that evidence of conspiracies often must be circumstantial, the fact that the water "emergency" has lasted for so long, the public pronouncements by the defendants, and the continuity on the BCPUD board of certain defendants, this court cannot conclude that it was clearly unreasonable for PLF to press a conspiracy claim. We cannot say that PLF had no chance of persuading a rational trier of fact that a conspiracy existed. Thus, we cannot recommend that PLF be sanctioned for bringing this claim.

PLF further makes the fair and unrebutted point that even individual defendants who left the board well before plaintiffs bought their property might still be liable for a takings conspiracy, since conspirators are liable for the subsequent acts of co-conspirators. Under PLF's theory, those directors who established and maintained the moratorium in order to block development could be held responsible for the ultimate injury they caused, even though they did not direct their actions specifically against the particular injured landowners.

6. Procedural Due Process (First Amendment) Claims

In the first, second, and fifth claims for relief in the amended complaint, the Lockarys, Gilberts, and Macey alleged that defendants BCPUD, Kayfetz, LeMieux, McClellan, Farnsworth, Amoroso, Niman, Schell, Harris, and Weston, *et alia*, deliberately failed to give plaintiffs personal notice of BCPUD actions related to water connections in violation of procedural due process.[32]

At least three distinct procedural due process issues have arisen during the course of this litigation: whether individual notice was required for enactment and re-enactment of the moratorium, whether individual notice was required for administrative acts related to the moratorium, and whether BCPUD directors were unbiased decisionmakers.

a. *Notice of enactment and re-enactment of the moratorium.*[33] PLF makes a weak attempt to distinguish the long-settled principle established in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 36 S.Ct. 141,

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[32] Although PLF labels its claims in the first and second causes of action "First Amendment denials" (i.e. through lack of notice defendants "sought to silence" plaintiffs, and cut off "all meaningful access and participation in . . . local government" affecting their property rights), Judge Williams recognized that PLF was essentially bringing a procedural due process action here.

[33] The procedural due process claim as it applies to notice of moratorium *enactment* can only apply to the Gilberts, since the Lockarys and Mr. Macey bought their property after the moratorium was passed. PLF has grudgingly acknowledged this. Amended Opposition to BCPUD's Motion for Fees at 88.

60 L.Ed. 372 (1915), that the due process clause does not require individual notice of legislation of general concern. Case law is clear that the *Bi-Metallic* principle applies to regulatory acts that may affect the value of real property. PLF first argues that the *Bi-Metallic* principle applies only when all persons are treated alike by the legislation, and that here the moratorium treats persons with and without water connections differently. Opposition to Summary Judgment on Procedural Due Process Claims, Dkt. No. 432 at 3. Since almost all legislation treats one group more favorably than another, this characterization of *Bi-Metallic* is absurd.

Second, PLF argues that the *Bi-Metallic* principle should not apply because plaintiffs were left politically powerless to influence the legislative acts of BCPUD by the deliberate acts of the BCPUD board itself keeping them disenfranchised, i.e. unable to become Bolinas residents and voters. But nothing in *Bi-Metallic* suggests that nonresidents of a jurisdiction are exempt from its principle, that is, entitled to individual notice of legislative acts affecting their property, simply because they are not voters.

It is true, as PLF contends, that compliance with a notice statute does not *automatically* preclude a procedural due process challenge. Here, however, Judge Williams ruled early in the life of the case that BCPUD was only required under the Constitution to give statutory notice, not individual mailed notice, in enacting and reenacting the moratorium. There seems to be no serious factual dispute that the provisions of the California Water Code for notice of moratorium hearings—notice by publication--were met, at least with respect to the most

recent re-adoption of the legislation. PLF has offered no reasons that are even remotely persuasive that Judge Williams' ruling was incorrect.

b. *Notice of administrative acts related to the moratorium.* PLF argues that plaintiffs were entitled as a matter of constitutional law to individual notice of every hearing held to consider any water permit application, as "competitors" with the permit applicant for a scarce resource. Amended Opposition to BCPUD's Motion for Fees at 88 and 92. It relies on *Frontier Airlines, Inc. v. Civil Aeronautics Board,* 349 F.2d 587 (10th Cir. 1965), which held that each applicant for an *exclusive* license from a government agency had due process rights in their competitors' hearings, since "[t]he granting of the first award effectively denies, without a hearing, all competing applications." PLF's effort to apply the *Frontier* principle by analogy to plaintiffs' situation is wholly unconvincing. *Frontier* did not address the issue of notice, only the issue of hearing consolidation. More importantly, PLF does not make a serious effort to show how water permit allocation decisions involve "mutually exclusive subject matter" that is equivalent to the grant of an exclusive franchise of the sort at issue in *Frontier.*

PLF is in effect arguing that each and every landowner whose property value is indirectly affected by an administrative land use action is constitutionally entitled to individual notice. PLF cites (for the first time in its brief opposing sanctions) several cases to support this proposition. See Amended Opposition to BCPUD's Motion for Fees at 90-98. None of these cases are supportive of PLF's radical position. *Walker v. City of Hutchinson,* 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956), only

addressed the notice due a landowner whose property actually was being condemned. Both *Horn v. County of Ventura*, 24 Cal. 3d 605, 156 Cal. Rptr. 718 (1979), and *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 99 Cal. Rptr. 745 (1972), only addressed the notice due *adjacent* landowners of development and use permit hearings involving his/her neighbor. *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), only addressed *when* the government may act summarily in response to a perceived emergency, i.e. the circumstances under which predeprivation notice and hearing are not required, not *who* is entitled to notice. Finally, *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), only addressed the inapposite question of individual notice due creditors of a decedent in probate proceedings.

PLF's argument that plaintiffs were entitled to individual notice of each administrative act of BCPUD was unreasonable and frivolous under existing due process law, and was not a good faith attempt to extend or modify that law. The unreasonableness of PLF's position becomes readily apparent when one considers that it was essentially asking the court to make a rule requiring individual notice to a virtually unlimited number of landowning parties of every service allocation decision by a public utility. Public service allocation always involves a "scarce resource". No reasonable attorney would expect a court to formulate such a rule.

c. *Unbiased decisionmaker.* In its opposition to summary judgment and its opposition to this sanctions motion, PLF asserts that defendants were not impartial decisionmakers in granting water service. *See, e.g.,*

Amended Opposition to BCPUD's Motion for Fees at 94: "Plaintiffs argued that directors are partial because they grant to themselves rights to use additional amounts of water such as for the purpose of building a swimming pool." This claim was never pled in the original or amended complaint, even obliquely, so this court finds it unreasonable for PLF to attempt to salvage its procedural due process action by so belatedly attempting to manufacture a new theory.

In sum, we find the entire procedural due process claim to be legally frivolous, unreasonable, and pursued in bad faith. The court recommends, therefore, that PLF, as the sponsor of this claim, be assessed monetary sanctions under the Court's inherent authority for the costs and fees incurred by defendants in defending the procedural due process claims brought in the original and amended complaints. We infer that PLF and its attorneys brought this claim in bad faith, because of the lack of colorable legal merit supporting the claim, and in light of the admonition given by Judge Williams, when he dismissed the original complaint, that plaintiffs would be punished for bringing frivolous claims. The undersigned also recommends that this court be directed to conduct a further hearing, as described in the introduction to this report, on the question whether Ms. Ruiz, Mr. Hughes, and Mr. Zumbrun, the attorneys who submitted both the original and amended complaints, should be held liable (1) under 28 U.S.C. § 1927, for excess costs and attorneys' fees incurred by defendants in litigating the procedural due process claim in the amended complaint, and/or (2) under the Court's inherent authority, for attorneys fees incurred by defendants in defending the procedural

due process claims in both the original and amended complaints.

For the reasons set forth above, the court concludes that plaintiffs' opposition to defendants' motion for summary judgment on the procedural due process issue, Dkt. No. 432, was also filed in bad faith. We therefore recommend that PLF be sanctioned under the Court's inherent authority for allowing this frivolous opposition to be filed under its auspices. We also recommend that further hearings be held to determine whether Mr. Finch, Mr. Zumbrun, and Mr. Best, the PLF attorneys submitting this opposition, be held personally liable for filing this opposition under inherent authority, 28 U.S.C. § 1927, or (in the case of Mr. Best, the signer of the paper) Rule 11.

While plaintiffs Lockarys, Gilberts, and Macey technically could be held liable under 42 U.S.C. § 1988 for attorneys' fees for asserting the frivolous procedural due process claim, see *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978), this court does not recommend that the District Court use its discretion to impose monetary sanctions under § 1988 against these plaintiffs in this instance. This claim was frivolous because it flouted well-established *legal* doctrine. Although plaintiffs are not completely blameless for subjecting defendants and the District Court to this claim, since they allowed their names to be attached to the pleading, the undersigned believes it would be unfair to hold plaintiffs responsible for a legal decision which is most directly ascribable to the bad faith of their lawyers.

PLF has implied that sanctions may not be imposed on the basis of claims such as this one that survive a

motion to dismiss. However, as the Fourth Circuit has stated, the fact that a pleading evades dismissal does not necessarily insulate it from sanctions:

> That the district court was persuaded in the early stages of the trial to deny a motion to dismiss does not decide the question of what the plaintiff and his counsel knew when they filed the complaint. Although in some instances a frivolous case will be quickly revealed as such, it may sometimes be necessary for the defendants to "blow away the smoke screens the plaintiffs had thrown up" before the defendants may prevail.

Introcaso v. Cunningham, 857 F.2d 965, 967 (4th Cir. 1988), *citing Hicks v. Southern Maryland Health Systems Agency*, 805 F.2d 1165, 1167-68 (4th Cir. 1986), and *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 881 (5th Cir. 1988). *Cf. In re Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986).[34] Moreover, since it was in part the obscure nature of plaintiffs' procedural due process claim that dissuaded Judge Williams from dismissing the claim outright, the end result we here reach is even more appropriate.

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[34] As the court conceded in *Yagman* (overruling the "post-trial lump" sum award of the trial court), it did "not condemn as inappropriate in all cases the procedure of withholding the sanctions decision until the end of trial (something, in fact, assumed in the Advisory Committee Notes to Rule 11). In some situations, liability under proper sanctioning authority will not be immediately apparent or may not be precisely and accurately discernible until a later time." *Id.* at 1183. The circuit court thus foresaw situations such as presented by the instant case.

7. Antitrust Claims

Plaintiffs' antitrust claims alleged restraint of trade and monopolization under the Sherman Act in three markets: (1) Bolinas property development, (2) Bolinas tourist accommodations, and (3) Bolinas water supply and delivery. In the twelfth cause of action in the amended complaint, plaintiffs Lockarys, Gilberts, Macey, and Mesa Ranch alleged a conspiracy by BCPUD and defendants Kayfetz and LeMieux to restrain trade in the property development and tourist accommodations markets. In the thirteenth claim, unspecified plaintiffs alleged a conspiracy by unspecified defendants to monopolize the property development and tourist accommodations markets. The specific wrongful acts cited in these two claims are much the same as those discussed in the constitutional claims, i.e. implementing and maintaining a service moratorium in response to a "sham" water emergency, treating existing residents more favorably than nonresidents in the appropriation of water, and limiting water supply development through land purchases and deed restrictions.

In the fourteenth and fifteenth claims for relief in the amended complaint, plaintiffs Holter and Mesa Ranch alleged restraint of trade and monopolization by BCPUD in the "Bolinas water development and delivery market". These plaintiffs alleged that the water emergency precluded Mr. Holter from developing and delivering water, that BCPUD denied access to county water regulations and procedures, that BCPUD refused "to augment and replenish BCPUD's water supply through development and sale or dedication of water by plaintiff . . . even

though BCPUD was under an affirmative duty to do so", Amended Complaint at ¶ 200(e), and that BCPUD prevented plaintiffs from developing water on their property.

PLF's first legal obstacle in its antitrust action against BCPUD was the state action immunity doctrine. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). PLF asserted several theories in an effort to avoid *Parker* immunity. It first argued that only local government action *mandated* or *compelled* by the state is immune. Consolidated Response to Motion to Dismiss, Dkt. No. 157 at 45. PLF has pointed to language in Supreme Court and lower federal court opinions that could be construed as endorsing such a restrictive test. *See* Amended Opposition to BCPUD's Motion for Fees at 71.

Second, PLF argued that only local action *actively supervised* by the state is immune. *Id.* at 72. Judge Williams rejected that contention, citing a then-recent Seventh Circuit case, *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983), rejecting the active supervision test. Judge Williams also noted, however, that as of that date the Supreme Court had "expressly reserved judgment whether the [state supervision] requirement applied [to government, as opposed to private, defendants]." Order of Dismissal, Dkt. No. 168 at 20.[35]

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[35] The *Town of Hallie* case was in fact later heard by the Supreme Court, which rejected the active supervision test for municipalities. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985).

Third, PLF argued that local action *not authorized* by the state is not "state action" and is therefore not immune; since maintenance of a water moratorium to restrict growth and restrain trade is not a purpose authorized by the Water Code, PLF insisted, BCPUD's actions were not truly "authorized" by the state. Consolidated Response to Motion to Dismiss, Dkt. No. 157 at 46. Case law also was not clear on this question at the time the amended complaint was filed. In a 1985 case, *LaSalle National Bank v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986), the Seventh Circuit, when faced with similar argument, ruled for defendant, but noted that it was a "close question." *Id.* at 379.

In light of the uncertainties in the law described above, this court cannot hold that PLF's arguments that *Parker* immunity should not apply were legally unreasonable. We cannot say that these arguments were made in bad faith, in light of the unsettled state of the case law at that time. Nor can the court predicate a finding of bad faith solely on the fact that PLF pressed plaintiffs' antitrust claims in the face of Judge William's prior express ruling that the *Parker* doctrine was fully applicable to the enactment and continuance of the moratorium; as PLF argues, it probably was required to replead these claims in the amended complaint in order to preserve the question for appellate review. See Wright & Miller, Federal Practice and Procedure, Civil § 1476 at 392 n.32. PLF cannot be sanctioned for protecting its record for appeal.

PLF also was faced with the issue of *Noerr-Pennington* immunity, i.e. immunity from antitrust liability for actions intended to influence governmental action. Defendants argued that they enjoyed *Noerr-Pennington*

immunity since "[p]laintiffs antitrust claims are based virtually entirely upon legislative policy and decision-making activities." Memo in Support of Motions to Dismiss Original Complaint, Dkt. No. 46 at 35. PLF responded by invoking the "sham exception" to this rule, which denies immunity to defendants whose actions are designed not to influence policy, but to "interfere directly with the business relationships of a competitor". *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961), *reh'g denied*, 365 U.S. 875. PLF pointed to several allegations in the amended complaint as grounds for invoking the sham exception: that defendants allegedly gave no notice of meetings, "abused the authority entrusted to them . . . , thwarted plaintiffs of any meaningful access to Marin County's land use procedures . . . and selectively enforced the building moratorium." Consolidated Response to Motion to Dismiss, Dkt. No. 157 at 53.

Judge Williams found, in dismissing the antitrust claims, that "plaintiffs fail to allege facts even remotely similar to any of the cases recognizing the [sham] exception, and fail to make out a *prima facie* case for invoking the exception." Order of Dismissal, Dkt. No. 168 at 23.

While the undersigned finds PLF's arguments on this issue obscure (at best), we are constrained to recognize that *Noerr-Pennington* and its sham exception are not the clearest or most settled doctrines in federal law. As recently as 1985, a district court noted the "confusing and contradictory decisions in the lower courts concerning the scope of the sham exception." *Racetrac Petroleum, Inc, v. Prince George's County*, 601 F.Supp. 892, 909 (D.Md. 1985), *aff'd*, 786 F.2d 202 (1986). Given this backdrop, this

court cannot conclude that PLF's efforts to argue that the challenged actions of defendants were outside the scope of the immunity were legally unreasonable or frivolous.[36]

The third legal obstacle to the viability of the plaintiffs' antitrust claims is the requirement that antitrust plaintiffs show some proprietary interest in the relevant market. Absent such a showing, plaintiffs can show no injury. As defendants point out, neither the Lockarys, the Gilberts, nor Mr. Macey alleged in the amended complaint a proprietary interest in either the property development or tourism markets, even though they all were joined in the causes of action alleging restraint of trade and monopoly in these markets. In fact, the amended complaint states very clearly that plaintiffs intended to build single-family homes on their property. Amended Complaint at ¶ 38. PLF's response is that "Everyone knows that single-family homes can be rented for tourist accommodation, especially in a beach area such as Bolinas." Amended Opposition to BCPUD's Motion for Fees at 76. However, plaintiffs repeatedly alleged in the amended complaint that their intention was only to develop single-family homes *for their own use:* "Lockarys . . . seek to build a home from which they can commute to their occupations in the San Francisco area",

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[36] In these sanctions proceedings, PLF raises for the first time the argument that *Noerr-Pennington* does not apply when government officials are alleged to be co-conspirators with petitioners. Amended Opposition to BCPUD's Motion for Fees at 74. This argument may have some merit. *See* Rathkopf, *The Law of Zoning and Planning* at §46.130[4][a]: "One of these exceptions [to *Noerr-Pennington*] is where government officials participate in the alleged antitrust conspiracy."

Amended Complaint at ¶ 15; "The Gilberts . . . have sought to commence the building of a home to which they can retire", *id.* at ¶ 16; "They [plaintiffs] are people who simply want to live on their property in Bolinas", *id.* at ¶ 2; "Without this suit, the only way plaintiffs can live in Bolinas . . . is to rent an illegal unit from an existing resident", *id.* ¶ 6; "plaintiffs wish to be community members and neighbors", *id.* at ¶ 8. The court concludes that the PLF's assertion of antitrust claims on behalf of the Lockarys, the Gilberts, and Mr. Macey, when these plaintiffs expressly had no interest in any of these markets, was factually frivolous and undertaken in bad faith.

By contrast, Mesa Ranch/Holter did plead a proprietary interest as a competitor in all three relevant markets. In the twelfth claim for relief in the amended complaint, Mesa Ranch claimed to be a potential competitor in both the Bolinas property development and tourist accommodations markets, and in the thirteenth claim, Mesa Ranch/Holter alleged a proprietary interest as a potential competitor in the Bolinas water development and delivery market.

Defendants argue that it was "ridiculous" to charge BCPUD with monopolizing the tourist market, since the district was not a competitor in that market. Memo Supporting Fees Under § 1927 at 46. The undersigned is not persuaded, however, that a government entity cannot be accused of creating a monopoly in favor of a private party, simply because the government entity itself was not a market competitor.[37] Here plaintiffs claimed that

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[37] *See* Rathkopf, note 36, *supra*, at §46.05[2][b]: "Vertical restraints by local government land use regulation often occur

BCPUD directors committed their anticompetitive acts in order to create a monopoly favoring existing residents. Defendants fail to cite any case law to support the proposition that plaintiffs must plead a personal proprietary interest on the part of defendants in the relevant market. Also, PLF did allege in the amended complaint that BCPUD had a proprietary interest in these markets as an owner of real property suitable for property development or tourist accommodation uses. Amended Complaint at ¶ 173(c).

PLF's greatest failing in its antitrust case was not in the arena of legal theory, but in the arena of evidence. PLF has never presented evidence that was even arguably sufficient to support a *prima facie* case that defendants conspired to restrain trade or monopolize either the tourist accommodation or property development markets. This fundamental failure, in combination with PLF's failure to point to a cognizable property interest of the individual plaintiffs in the relevant markets, persuades us that PLF and some of its attorneys prosecuted these particular antitrust claims in bad faith.

In their brief opposing the sanctions motions, PLF lists the evidence that it claims supports the antitrust claims. First, to support the claim of conspiracy to restrain trade and monopolize the tourist accommodation market, PLF offers evidence that shows no more than that some defendants opposed tourism and tried to drive tourists away. PLF also cites the "opposition plaintiff

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when local government plays the role of 'supplier' imposing zoning restrictions from above which favor a particular land 'consumer' or user over another."

Holter received from defendants toward his development plans" as evidence of a conspiracy to restrain the Bolinas tourism trade. Amended opposition to BCPUD's Motion for Fees at 80. It is not clear to this court how any of the evidence that shows defendants' general unhappiness with tourists, or opposition to development, helps prove that defendants were trying to restrain *competition* in the tourist market. Also, as defendants rightly point out, the evidence of defendants' antitourist campaign flatly cuts against plaintiffs' monopoly theory, in which defendants are charged with *favoring* the economic interests of existing tourist businesses.[38]

PLF also cites the BCPUD board's approval of expanded water permits to existing residents and denial of permits to nonresidents as evidence that defendants intended to create a monopoly in tourist accommodations in favor of existing residents. PLF fails to show, however, how this evidence lends any support to its antitrust theory. It is not at all clear how this evidence, even if accepted at face value, tends to show that defendants participated in an anticompetitive conspiracy directed at the tourism market in Bolinas.

In a comparably obscure effort to show that there was some support for its claims of restraint of trade and monopolization of the Bolinas property development market, PLF again points to BCPUD's approval of water

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[38] It is odd, for instance, that PLF presents the complaints of an owner of an *existing* tourist facility as probative of defendants' monopoly motives. Exhibit A(2) to Amended Opposition to BCPUD's Motion for Fees.

permits to residents and denial to nonresidents.[39] Once again, there is a huge inferential gap between this evidence and the allegation that defendants intended to monopolize or restrain competition in property development.

While the undersigned gives PLF the benefit of reasonable doubt in the context of a sanctions action, this factual support is simply far too thin to conclude that PLF could have believed that its clients ever had the makings of a meritorious case on the antitrust claims involving the tourist accommodation and property development markets. The lack of a proprietary interest on the part of the Lockarys, the Gilberts, and Mr. Macey in the relevant markets underscores the speciousness of bringing an action claiming anticompetitive injury. Thus, we are forced to conclude that these antitrust claims were brought in bad faith. The undersigned therefore recommends that PLF be assessed monetary sanctions under the court's inherent authority for bringing the factually groundless antitrust actions asserted on behalf of plaintiffs Lockarys, Gilberts, and Macey in both the original and the amended complaints. We also recommend that a further hearing be held to decide whether the PLF attorneys submitting the original and amended complaints, Ms. Ruiz, Mr. Hughes, and Mr. Zumbrun, should also be

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[39] Plaintiffs also cite to a clause in a sales agreement between the County and BCPUD on an unidentified piece of tax-deeded property that binds BCPUD to sell the property only to those with lots adjacent to the property. Exhibit A(20 to Amended Opposition to BCPUD's Motion for Fees. Without any accompanying details of the circumstances of this sale, the court finds this evidence unhelpful.

held liable for sanctions under the court's inherent authority (for the antitrust claims applicable to these plaintiffs brought in the original and amended complaints) and/or 28 U.S.C. § 1927 (for the antitrust claims brought in the twelfth and thirteenth causes of action in the amended complaint).

The factual support for the claim that defendants intended to monopolize the water development and delivery market to the exclusion of Holter/Mesa Ranch is not as clearly vacuous. PLF offers evidence that BCPUD opposed Mr. Holter's application to the State Water Resource Control Board to develop a reservoir on his land, Exhibits C(11) and C(13) to *id.*, and that Mr. Niman and Mr. Schell (who are not named defendants in these claims) "built one of the two potential reservoirs for their own use after prohibiting the seller from developing water." *Id.* at 81. While these proffers are certainly not overwhelming, they are not sufficiently anemic to justify sanctioning PLF for pressing this portion of its antitrust case.

8. Statute of Limitations and Fraudulent Concealment

Plaintiffs claimed that they were not subject to the statute of limitations on their constitutional and antitrust claims because they did not know of defendants' wrongful acts before the period had run, and could not have known because of defendants' fraudulent concealment of their actions. Defendants contend here that plaintiffs' fraudulent concealment argument was unreasonable, in

part because it contradicted the original complaint's allegation that defendants' wrongful conduct had been public since 1971. Plaintiffs try to reconcile these seemingly-inconsistent positions by noting that only some of the claimed wrongful actions were public, while others were private. Standing alone, this anemic explanation would not be sufficient. In combination with the considerations set forth below, however, it helps PLF avoid sanctions for presenting the fraudulent concealment theory.

Defendants argue that the fraudulent concealment theory is fundamentally inconsistent with plaintiff Gilbert's admitted knowledge of the 1976 BPOA suit. We note that the BPOA suit does closely track many of the key allegations made in the takings and due process claims in the amended complaint: i.e., that the moratorium was arbitrary and capricious, that the water emergency was a sham and was declared only for growth control purposes, that BCPUD failed to maintain or increase water supply capabilities, that inadequate notice was given, and that plaintiffs suffered deprivation of value as a result. Mr. Gilbert, however, has testified under oath that while he contributed modest sums to BPOA and was vaguely aware of its suit against BCPUD, he had no meaningful understanding of what the case was about or the legal theories on which it was based. While the court does not find these assertions overwhelmingly plausible, there is insufficient evidence to support a clear conviction that Mr. Gilbert is lying. Moreover, PLF appears to bolster its argument by contending that what was fraudulently concealed was not the sham nature of the original moratorium, but the shared conspiratorial intention of the individual defendants to take no steps to expand water

supplies and thus to perpetuate the moratorium indefinitely. This contention is not so clearly frivolous to justify imposition of sanctions.

B. Specificity of Claims Against Individual Defendant Directors

The court is troubled by the manner in which individual BCPUD directors were treated in this litigation. Judge Williams also was concerned about the chilling effect that the threat of litigation such as this could have on citizen participation in local government. "[T]he court would be remiss if it failed to remind plaintiffs that it is deeply concerned about the potential impact this kind of litigation might have on the willingness of individuals to become involved in government, either as private citizens or as elected officials." Order and Memorandum, Dkt. No. 109 at 5. In dismissing the original complaint with leave to amend, Judge Williams ordered plaintiffs to "plead with specificity facts which indicate a nexus between each defendant and the alleged wrongs suffered." *Id.* at 4-5.

While the amended complaint was somewhat more specific in describing acts that led to the claimed injury, it made *no* effort to specifically link any of the individual defendants with any of the claimed wrongful acts (beyond naming individual defendants in particular causes of action). For instance, while it decries the "purchase of property [and] the use of deed restrictions and contracts" to restrict water development, the amended complaint makes no effort to specify *which* purchases or *which* deed restrictions are at issue, or, more importantly,

which defendants should be held responsible for approving the wrongful transactions. The amended complaint also did not distinguish among defendants in terms of period of tenure on the board, even though this could be important in determining which defendants can be held responsible for which of the acts that plaintiffs attack.

While liberal pleading rules might well justify lack of specificity in the original complaint, it is difficult to perceive an excuse for PLF's failure to follow an express order of the court requiring more specific allegations in the amended complaint. This is not a situation in which plaintiffs' counsel could plausibly argue that they were incapable of being more specific until after conducting substantial discovery. PLF had spent two years investigating these matters prior to filing its amended complaint. It had the benefit of the earlier BPOA action. And most of the allegedly wrongful conduct it ultimately ascribed to defendants had been committed in public meetings. PLF appears simply to have made no meaningful effort to comply with Judge William's order. This is not a case where some of the connecting of individual defendants and specific wrongful acts was put in the amended pleading and some was left out. Rather, the amended complaint contained *virtually none* of the connecting for which the judge called.

PLF continued its refusal to draw the required act-defendant nexus when individual defendants asked for specification during the course of discovery. In May of 1984, when individual director defendants asked plaintiffs through a series of interrogatories to "describe fully all acts or omissions or other conduct of [defendant]

which you contend are . . . relevant to your claims in this action", PLF responded that "We have not yet had an opportunity to review all of the information that we have collected in this case and we do not yet know all of the specific answers which this interrogatory requests." PLF then simply recycled the conclusory allegations of the amended complaint. This indicates either that PLF had no factual support for the claims against these director defendants when it filed the amended complaint, or that PLF deliberately refused to answer the interrogatories. When PLF belatedly supplemented its answers to these interrogatories—as much as eight months later—the vast majority of the allegedly wrongful acts it ascribed to individual directors were public votes to increase water usage by existing residents.

The court finds that counsel for plaintiffs acted unreasonably and in bad faith when, despite Judge Williams' clear order, they refused to set forth in the amended complaint the specific acts by the individual defendants that allegedly offended the constitutional and statutory norms relied on by plaintiffs. Therefore, the court recommends that PLF be sanctioned under the Court's inherent authority, and also recommends that a further hearing be held to decide whether the PLF attorneys responsible for submitting the amended complaint, Ms. Ruiz, Mr. Zumbrun, and Mr. Hughes, should also be held personally liable under inherent authority. Sanctions against these individual attorneys may also be appropriate under 28 U.S.C. § 1927 if defendants can further show, in the proceedings that will determine the magnitude of the sanctions, that this failure to connect individual defendants with specific wrongful acts multiplied the

proceedings and caused defendants to incur costs beyond what they would have faced if the amended complaint had complied with Judge Williams' order.

C. Support for Damages Claims Against Individual Defendants

The court also must evaluate the factual support PLF had for each of the claims brought against each defendant director. For purposes of assessing the factual merits of plaintiffs' case, the evidentiary foundation for the claims against each defendant—as presented in the briefs and exhibits submitted both in the substantive litigation and in these sanctions proceedings, as well as in interrogatory responses—is summarized below. The above discussion of the legal merits of each claim for relief also applies here. Since the director defendants enjoyed absolute immunity from damages for their legislative acts, e.g. enactment and re-enactment of the moratorium, only nonlegislative acts are listed below.

Niman and Schell. Defendants Niman and Schell were joined in the due process, equal protection, civil rights, and civil rights conspiracy claims. The allegedly wrongful acts attributed to these defendants included voting for various expanded water uses (including water for Mr. Niman's farm), not exercising BCPUD's option on the "Vierra property" (apparently a potential water source site), voting not to replace a collapsed water tank, and adjusting various high water bills caused by meter leakage. The only act not related to a BCPUD vote was purchasing the "Bunnel-Felger" property, which PLF claims was a prime source of water for Bolinas, "for their

own private use after denying development by its prior owner." Opposition to Individual Defendants' Motions for Fees at 19. Mr. Schell was also accused of advocating "using the alleged water emergency to stop development and control growth" while on the board.

LeMieux, Farnsworth, and McClellan. These defendants were joined in the procedural due process, takings, due process, equal protection, inverse condemnation (Mesa Ranch), civil rights, and civil rights conspiracy claims. In addition, Ms. LeMieux was joined in two antitrust claims, restraint of trade and monopoly of the tourist/property development markets. Their claimed wrongful acts included voting to approve water permits to various second units--most of which occurred *after* the amended complaint was filed—and the sale of three BCPUD lots to the Harris'. Plaintiffs point to various antigrowth statements made by Ms. LeMieux and Mr. McClellan during the BCPUD campaign, e.g. statements advocating "continuance of the moratorium on new water hook-ups until a legally foolproof method for gradual growth is established", Exhibits A(8), A(42) and A(44) to Amended Opposition to BCPUD's Motion for Fees, and statements by defendants in a water workshop expressing slow growth sympathies, *id.* at 110-111 and Exhibit 20 to Finch Declaration. There is also evidence that Mr. McClellan and Ms. LeMieux spoke before the Coastal Commission on behalf of BCPUD regarding Mr. Holter's application to amend the local coastal plan. Exhibit C(10) to Amended Opposition to BCPUD's Motion for Fees. PLF has presented nothing in the record to support an antitrust claim against Ms. LeMieux.

Amoroso. Defendant Amoroso was joined in the due process, equal protection, civil rights, and civil rights conspiracy claims. The only factual support for naming Mr. Amoroso was his vote granting a conditional water permit for a studio and his vote to "legalize 25 or 30 illegal second units." PLF claims this supports the conclusion that Mr. Amoroso "consistently participated in the continuation of the moratorium as a growth control device and the administrative decisions consistent therewith." *Id.* at 12.

Harris. Defendant Harris was joined in the due process, equal protection, civil rights, and civil rights conspiracy claims. Ms. Harris' allegedly wrongful acts included voting not to exercise the Vierra option, denying "Sherman Smith's request for a land division" (the significance of this is unclear), approving various requests for water permits, approving a request to reduce a water bill because of leakage, and "advocat[ing] using the alleged water emergency to stop development and control growth." The most recent act charged to Ms. Harris occurred in 1974. Nothing else in the record links Ms. Harris to unconstitutional acts.

Kayfetz. Defendant Kayfetz was joined in the procedural due process, takings, due process, equal protection, inverse condemnation (Mesa Ranch), civil rights, and civil rights conspiracy claims, as well as two antitrust claims, restraint of trade and monopoly of the tourist/property development markets. In response to Mr. Kayfetz' interrogatories, PLF cites a number of acts it claims support these allegations: that Mr. Kayfetz personally profited from the emergency by obtaining a larger water meter for himself, that he voted to approve several

expanded water permits and other water use requests, that he "offered the Vierras an opportunity to repurchase their property" and abandoned water rights to Pine Gulch Creek, and that he failed to replace a collapsed water tank.[40] The record also includes campaign statements by Mr. Kayfetz linking the moratorium with growth control, Exhibits A(8) and A(42) to Amended Opposition to BCPUD's Motion for Fees, allegations to a grand jury that Mr. Kayfetz told the BCPUD maintenance manager to "cool it" regarding ample water supplies, Exhibit A(1) to *id.*, and evidence of Mr. Kayfetz' anti-tourism sentiments (see antitrust section), which plaintiffs characterize as a "conspiracy to . . . discourage tourism", Amended Opposition to Individual Defendants' Motions for Fees at 10. There is also evidence that Mr. Kayfetz spoke before the Coastal Commission regarding the Mesa Ranch application.

Weston. Defendant Weston was joined in the due process, equal protection, civil rights, and civil rights conspiracy claims. In its response to Ms. Weston's interrogatories, PLF points to the following alleged wrongful acts of Ms. Weston: offering the Vierra property for repurchase, approving several water permit applications, and failing "to plan action against outlawing building, [or] enforce existing district regulations on multiples". PLF's exhibits also contain an undated newspaper article

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[40] PLF also cites several alleged wrongful acts by Mr. Kayfetz without explaining their relevance or significance to their case: i.e. that Mr. Kayfetz "sold a parcel of land to Ruth Duty"; that he "decided to purchase 'all lots not failing down cliffs' "; that he sold three lots to the Harrises; and that he "purchased parcels of tax-deeded land."

in which Ms. Weston is quoted as saying "we will continue to regulate growth through utilities", Exhibit A(37) to Amended Opposition to BCPUD's Motion for Fees, and a letter to the editor from Ms. Weston characterizing the moratorium as a "planning measure" linked in part to growth concerns, Exhibit A (40) to *id.*

Discussion. On this record, we cannot conclude that it was clearly factually frivolous for PLF to allege that individual directors were part of a conspiracy to deprive the Lockarys, the Gilberts, and Mr. Macey of their just compensation, substantive due process, and equal protection rights. While individual BCPUD directors were entitled to absolute legislative immunity from liability for damages arising from their votes enacting and reenacting the water emergency and moratorium, they enjoyed only qualified immunity for their administrative votes related to enforcement of the moratorium and management of Bolinas' existing and potential water sources. We have explained above why we cannot find that the civil rights conspiracy claim against the BCPUD board, as related to the taking, substantive due process, and equal protection causes of action, was legally or factually frivolous. It would not have been entirely implausible for PLF to ask a court to infer that all of the directors on the BCPUD board during the time in which the moratorium was in place were participating in this alleged conspiracy. PLF has managed to point to some nonlegislative acts by each of the nine individual directors that might help support an inference that they shared a conspiratorial objective of perpetuating the moratorium to illegally prevent the use of plaintiffs' land. Even though the list of

alleged wrongful acts offered by PLF against some defendants is exceedingly short, this court cannot say for any defendant that a trier of fact could never conclude that they participated in a civil rights conspiracy. Since conspirators are liable for the acts of co-conspirators, this court also cannot conclude that it was utterly frivolous for PLF to join individual defendants in the primary taking, substantive due process, and equal protection claims. While we remain concerned about the deleterious impact that the threat of personal liability for large damage awards may have on the willingness of private citizens to participate in local government, this court cannot recommend sanctions for joining the director defendants in the takings, substantive due process, equal protection, or civil rights conspiracy claims in the amended complaint.

We also cannot find that PLF's inverse condemnation case against the individual defendants who purportedly testified against Mesa Ranch development plans was clearly frivolous. While the director defendants were entitled to qualified immunity for these actions, it may have been fair for PLF to ask a court to draw the inference that the representations were made with the intent to reduce the value of Mesa Ranch in anticipation of condemnation, and that defendants therefore made the representations in bad faith, i.e. with knowledge of the illegality of their actions. Therefore, the court does not recommend sanctions for asserting the Mesa Ranch/Holter inverse condemnation claim against the named director defendants.

Evidence of participation in an anticompetitive conspiracy by the two individual defendants named in the

antitrust claims, Ms. LeMieux and Mr. Kayfetz, is totally lacking. Statements by these defendants expressing general antitourist proclivities hardly begin to prove a case for restraint of competition in the tourist trade, and these statements have no logical relevance whatsoever to the monopoly claim. The patent logical implausibility of these claims, coupled with the fact that after seven years of investigation and research, PLF can cite *no* evidence that supports these causes of action, supports our conclusion that PLF and attorneys Ruiz, Hughes, and Zumbrun acted in bad faith when they charged Ms. LeMieux and Mr. Kayfetz with violating antitrust laws. The undersigned therefore recommends that the District Court rely on its inherent authority to impose sanctions on PLF for filing and pursuing antitrust claims against these defendants. In addition, we recommend that a further hearing be held on the question whether Ms. Ruiz, Mr. Hughes, and Mr. Zumbrun should be held personally liable under the Court's inherent authority for attorneys' fees incurred by Ms. LeMieux and Mr. Kayfetz in defending against the antitrust causes of action, and/or under 28 U.S.C. § 1927 for excess costs and attorneys' fees incurred by these defendants in litigating the antitrust claims in the amended complaint.

D. Litigation Tactics and Misconduct

The conduct of PLF attorneys in prosecuting this action, apart from the merits of its case, has not been a model of responsible advocacy or professionalism. PLF

glossed over crucial facts in the amended complaint concerning plaintiffs' disparate position when it was convenient to do so. It failed to respond to defendants' first set of interrogatories until some eight months after answers were due. It attempted to end-run Judge Williams' discovery stay by filing a frivolous action in state court. PLF attorneys apparently rejected joint service of process through defendants' lead counsel (though they later sought coordination of defense counsel when it suited their interests). Exhibit D to Harris Declaration, Dkt. No. 500; Harris Declaration at 5. They warned defense attorneys about a claimed conflict of interest in joint representation of defendants in what appears to have been a heavyhanded effort to force each defendant to hire separate counsel. Harris Declaration, Dkt. No. 500 at 2-3 and Exhibits C and D. While we are deeply troubled by the pattern of tactical excess exhibited by this behavior, we do not recommend that monetary sanctions be imposed for it. We do recommend, however, that the District Court impose monetary sanctions for two specific motions brought by PLF which were clearly unfounded and filed in bad faith: (1) the motion for abstention and (2) the motion to strike BCPUD's motion to dismiss.

PLF filed a motion for *Pullman* abstention in 1985, after opposing defendants' abstention motion two years earlier. While it is true that in the two-year interim the Supreme Court changed the ripeness requirement for land use cases, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this does not excuse the blatant reversal of position PLF made on a crucial element of abstention analysis. Specifically, PLF first

argued, when *opposing* defendants' earlier motion for abstention, that "[t]he determination of whether defendants have deprived plaintiffs of constitutionally protected rights, and whether defendants have violated federal antitrust laws *do not turn on any sensitive social policy recognized by law.*" Plaintiffs' Consolidated Response, Dkt. No. 74 at 6 (emphasis added). Contrast this with PLF's later statement that "issues such as those raised by this case which relate to land use planning by entities of local government *have been 'repeatedly noted' to be 'a sensitive area of social policy* that meets the first requirement for *Pullman* abstention.' " Memorandum in Support of Abstention, Dkt. No. 299 at 3 (emphasis added). This blatant, unexplained reversal of position cannot be rationalized as a product of any change in abstention case law; rather, it obviously was a product of PLF's desire to bail out of this litigation when it saw ripeness obstacles (not to mention attorneys' fees liability) looming on the horizon. The undersigned finds that PLF's unexplained reversal of its position on the abstention issue was in bad faith, and so recommends that the District Court, drawing on its inherent authority, impose a monetary sanction on PLF.

PLF filed a motion to strike early in this litigation that also was clearly frivolous. When defendants brought, under short title, a "Notice of Defendants' Motions to Dismiss and Strike Time-Barred Claims", PLF responded with a pointless motion to strike, the purported basis of which was that defendants had not *captioned* their motion "Notice of Defendants' Motions *and Motions* to Dismiss Complaint and Strike Time-Barred Claims". Consolidated Motion to Strike, Dkt. No. 71 at 2-3, and Memorandum in

Support of Consolidated Motion to Strike, Dkt. No. 72 at 3-4.[41] In the course of bringing this obviously petty and frivolous motion, PLF had the *chutzpah* to lecture the court about the virtues of pleading with specificity: "Proper pleading provides the District Court jurisdiction to rule, and serves a vital function in that proper pleading defines and expedites matters before the Court." *Id.* at 4.

Since this motion was filed in bad faith and unreasonably and vexatiously multiplied the proceedings, the undersigned recommends that PLF be sanctioned under the Court's inherent authority. We also recommend that further hearing be held to decide whether Ms. Ruiz, Mr. Hughes, and Mr. Zumbrun, the attorneys submitting the motion and accompanying memorandum (Dkt. Nos. 71 and 72), should be sanctioned under the Court's inherent authority, 28 U.S.C. § 1927, or (in the case of Ms. Ruiz, the signer of the motion and memorandum) Rule 11, for the costs and/or attorneys' fees that defendants incurred in responding to this motion.

V. SUMMARY AND CONCLUSION

To summarize, the court finds the following acts were taken in bad faith, and (1) recommends that the District Court impose monetary sanctions on PLF for these actions; and, (2) in the case of the individual PLF attorneys named below, recommends that the District Court

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[41] Both the motion and the accompanying memorandum were submitted by PLF attorneys Ronald Zumbrun, Harold Hughes, and Darlene Ruiz, and signed by Ms. Ruiz.

direct this court to hold a hearing to decide whether sanctions should be imposed under the cited authority:

- PLF (inherent sanctioning authority), for misrepresenting and obfuscating the inverse condemnation claims of plaintiffs Holter and Mesa Ranch;

- PLF (inherent authority), Ms. Ruiz (inherent authority and § 1927), Mr. Zumbrun (inherent authority and § 1927), Mr. Hughes (inherent authority and § 1927), Mr. Finch (§ 1927), and Mr. Best (§ 1927 and Rule 11), for asserting legally frivolous procedural due process claims;

- PLF (inherent authority), Ms. Ruiz (inherent authority and § 1927), Mr. Zumbrun (inherent authority and § 1927), and Mr. Hughes (inherent authority and § 1927), for asserting the factually frivolous antitrust claims of plaintiffs Lockarys, Gilberts, and Macey;

- PLF (inherent authority), Ms. Ruiz (inherent authority and § 1927), Mr. Zumbrun (inherent authority and § 1927), and Mr. Hughes (inherent authority and § 1927), for failing to follow Judge Williams' instructions to plead the specific nexus between each alleged wrongful act and each individual defendant;

- PLF (inherent authority), Ms. Ruiz (inherent authority and § 1927), Mr. Zumbrun (inherent authority and § 1927), and Mr. Hughes (inherent authority and § 1927), for naming defendants Kayfetz and LeMieux in the antitrust claims in the amended complaint;

- PLF (inherent authority), for its bad faith conduct in reversing position on the *Pullman* abstention issue;

- PLF (inherent authority), Ms. Ruiz (inherent authority, § 1927, and Rule 11), Mr. Zumbrun (inherent authority and § 1927), and Mr. Hughes (inherent authority and § 1927), for filing an unreasonable motion to strike.

The undersigned finds that PLF has had abundant notice that sanctions were possible. Defendants have stated their belief throughout the substantive litigation that this action was brought in bad faith, and informed all concerned that attorneys' fees would be sought. Judge Williams gave an explicit warning early in the case, both orally and in a written order, that PLF's action gave rise to a suspicion of bad faith and the risk of sanctions, and suggested ways counsel could remedy the deficiencies.

If Judge Williams adopts our findings and accepts our recommendations on the liability issue, the undersigned will call a status conference to discuss further proceedings, including notice and hearing procedures for determining the personal liability of individual PLF attorneys, and procedures for determining the amount of the attorneys' fees and costs that will be awarded as sanctions.

DATED: January 11, 1990

/s/ Wayne D. Brazil
Wayne D. Brazil
United States Magistrate

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, et al., Plaintiffs, v. PAUL KAYFETZ, et al., Defendants.	C-82-6191-SW ORDER ADOPTING RECOMMENDATION OF MAGISTRATE FILED JANUARY 28, 1991 (Filed Feb. 11, 1991)

I have carefully reviewed the Report and Recommendations by Magistrate Brazil acting as Special Master and filed on January 28, 1991 with respect to the amount of liability of plaintiffs' attorneys, Pacific Legal Foundation, for sanctions.

I concur with the recommendation of Magistrate Brazil that sanctions be imposed on Pacific Legal Foundation. I find that the circumstances of this case clearly support the imposition of monetary sanctions in the amount of $136,434.50 on the Pacific Legal Foundation.

I HEREBY ADOPT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ACCEPT THE RECOMMENDATIONS CONTAINED THE REPORT BY MAGISTRATE BRAZIL FILED JANUARY 28, 1991.

Pacific Legal Foundation is HEREBY ORDERED to pay sanctions for litigation expenses for its bad faith conduct in the amount of $136,434.50.

IT IS SO ORDERED.

DATED: 2/7/91 /s/ Spencer Williams
UNITED STATES DISTRICT
COURT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, et al.,

Plaintiffs,

v.

PAUL KAYFETZ, et al.,

Defendants.

_____/

NO. C 82 6191 SW (WDB)

SPECIAL MASTER'S RECOMMENDATIONS RE CHARACTER AND MAGNITUDE OF SANCTIONS

(Filed Jan. 26, 1991)

On April 2, 1990, the District Court adopted the Report and Recommendations of the special master with respect to the liability aspects of defendants' motions for sanctions and ordered the undersigned to commence further proceedings for the purpose of formulating recommendations about what the nature and magnitude of the sanctions should be. The recommendations contained herein are responsive to that order.

THE PROCEEDINGS AGAINST THE INDIVIDUAL ATTORNEYS

The undersigned originally proposed that sanctions proceedings go forward against not only the Pacific Legal Foundation (hereafter PLF), but also five individual attorneys whose names had appeared on various papers that were filed in this action. Pursuant to a schedule worked out in June of 1990, the individual attorneys and the interested defendants briefed issues raised by the court's

commencement of sanctions proceedings against the five individual attorneys. For reasons set forth in Recommendations filed October 22, 1990, the undersigned concluded that the proceedings against the five individual attorneys should be terminated. The District Court concurred and the sanctions proceedings against the five individual attorneys were terminated. In the substantive sections that follow, the undersigned has not included any fee shifting sanction for any work any defendant has done in connection with the court-initiated proceedings against the individual attorneys. The undersigned has concluded that it was his error of judgment that resulted in this work being done; given that fact, it would not be fair to require PLF to reimburse defendants for the time they committed to this aspect of these proceedings. The undersigned apologizes to the individual attorneys for initiating the proceedings at the time and in the manner they were initiated and to the defendants who were constrained by the undersigned's initiation of those proceedings to incur some additional litigation expenses.

THE LEGAL PRINCIPLES THAT SHAPE THE DELIBERATIONS ABOUT THE SANCTIONS AGAINST PLF

For reasons discussed at some length in the Report and Recommendations filed January 11, 1990, the Court relies on its inherent authority in imposing sanctions on PLF, *not* on Rule 11 of the Federal Rules of Civil Procedure, on 28 U.S.C. §1927, or on *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), and its progeny.

Sanctions do not include fees for work at the appellate level.

The sanctions recommended below include nothing for work done by defense counsel on *appellate* aspects of this case. While the matter is not wholly doubt free, it appears to the undersigned that a district court is without authority to adjudge whether conduct committed in the appellate process warrants sanctions. Such judgments are more properly made by the court of appeals.

In *United States v. Blodgett*, 709 F.2d 608, 610-611 (1983), the Court of Appeals suggested that a district court's inherent authority might be a sufficient predicate for imposing a sanction on a party "for bringing a frivolous appeal and for 'unnecessarily consuming time.' " *Id.*, at 610. The appeal in issue in that matter, however, was interlocutory, and the appellate court had had occasion to study the merits of the appellant's contentions at the appellate level before sending the matter back to the district court to reconsider the sanctions it had imposed. Moreover, the *Blodgett* court did not consider either the implications of Rule 38 of the Federal Rules of Appellate Procedure or some of the matters of policy that have been more thoroughly explored in a much more recent opinion by the United States Supreme Court. Thus, rather than simply follow *Blodgett*, we must weigh carefully the implications of *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447 (1990).

In *Cooter & Gell* the Court considered (among other things) whether Rule 11 (as opposed to inherent authority) conferred power on district courts to impose sanctions for conduct in the appellate process. While basing

its negative answer to this question primarily on its interpretation of Rule 11 and of Rule 38 of the Federal Rules of Appellate Procedure, the policy considerations referred to by the Court would seem to support the broader inference that there is no source of authority for a district court to pass judgment (for purposes of imposing sanctions) on a party's conduct at the appellate level (at least in the normal situation, when jurisdiction has passed to the court of appeals, as distinguished from a situation that involves only an interlocutory appeal, where jurisdiction might remain in or return to the district court, e.g., *United States v. Blodgett, supra*). Given the spirit and the sweep of the policy considerations that underlie the Court's decision in *Cooter & Gell*, it is my judgment that if the question were squarely presented, the Supreme Court also would hold that inherent judicial authority is not a sufficient predicate for a *district* court to impose sanctions on conduct by a party at the court of appeals level. Thus I recommend that the district court in this case decline to consider whether PLF or plaintiffs should be sanctioned for how they handled any aspect of this matter on appeal.

The propriety of restrained fee shifting as the form of sanction.

An important threshold issue, raised somewhat obliquely by PLF, is whether the district court, in the exercise of its inherent powers, may impose a fee shifting sanction. Although the tradition of invoking inherent authority is long-established in federal courts, see, e.g., *Ex Parte Burr*, 22 U.S. (9 Wheat.) 529 (1824), there are relatively few cases that offer much insight into the question we address here. Those cases, however, indicate that

the district court's inherent authority is a sufficient predicate for imposition of a sanction that includes the shifting of fees and expenses incurred as a result of the bad faith conduct of an opposing party or lawyer.

The courts have recognized that the justifications for resort to inherent judicial authority involve three closely related purposes: (1) to protect the courts themselves from abuses that interfere with the "due and orderly administration of justice" and that undermine the courts' "authority and dignity," *Cooke v. United States*, 267 U.S. 517, 539 (1925), (2) to punish lawyers or parties who abuse the judicial process in bad faith and thus to deter such abuses in the future, *Nasco, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120 (W.D. La. 1989) (see especially cases discussed at 140-141); affd 894 F.2d 696 (5th Cir. 1990); cert. granted *Chambers V. Nasco, Inc.*, 111 S.Ct. 38 (October 1, 1990) ; *Perez v. Velez*, 629 F.Supp. 734, 736-37 (S.D. N.Y. 1985) and (3) to protect litigants who suffer obvious and real economic harm solely as a result of an opposing lawyer's or party's bad faith abuse of the judicial process (see,. e.g., cases cited in footnote 17 of *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974).

It is important to emphasize that the courts have not viewed these purposes as distinct and potentially in tension, but as closely related and complementary. For example, at the Supreme Court level, the "inherent authority" cases that are most relevant here have involved exceptions to the "American Rule" that each party to litigation normally must bear its own attorney fee expenses. In *F. D. Rich Co., Inc., v. Industrial Lumber Co., Inc.*, 417 U.S. 116 (1974), *Alyeska Pipeline Service Company v. The Wilderness*

Society, 421 U.S. 240 (1975), and *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), the Supreme Court has recognized that district courts have inherent authority to *shift fees* when it has been shown that a party (or counsel, in *Roadway*) has pursued litigation in bad faith. In essence, the Court has recognized that a party that can show that it has suffered the wrong of being forced to defend against litigation brought or pursued in bad faith may be awarded fees it reasonably incurred as a result of that wrong. In part because it departs from the American Rule, such fee shifting, as a sanction, also serves the courts' interests in protecting the integrity of their processes and in punishing and deterring bad faith abuses of those processes. Indeed, in some circumstances the shifting of fees may be *necessary* if the objectives of punishment and deterrence are to be meaningfully advanced. If courts could not shift fees, parties or litigants might cynically calculate that the economic value to them of abusing the litigation process (and through it, their opponents) would exceed both the economic and non-economic pain that they would suffer from other sanctions even if their conduct ultimately was adjudged to have been in bad faith. While courts might have the power to impose fines (unrelated to the magnitude of the expenses caused by the misconduct) of sufficient size to serve adequately the punishment and deterrence objectives, it makes little sense to resort to such arbitrary measures when it is possible to accomplish the additional objective of protecting the victim of the wrong by fee shifting.

Using fee shifting as the form of sanction in settings like this offers additional advantages. One is that there is some predictability to the size of the penalty faced by the

wrongdoer. At least the lawyer or client who is aware that he or she is proceeding in bad faith, or is running a serious risk of being so adjudged, has some capacity to estimate how large an opponent's fee bills are becoming, and, with that, may feel some incentive to desist or retreat when the bills mount. In other words, when sanctions take the form of fee shifting, the pressure to stop the misconduct mounts directly in proportion to the fee-injury being inflicted by that misconduct.

As compared to the alternative of levying a fine, fee shifting also offers the advantage of being an inherently more rational process (fixing the size of a fine is an essentially arbitrary exercise, and obviously arbitrary acts are unbecoming to the judiciary, where reason dominates the institutional self-image). In addition, fee shifting prevents an opposing party from gaining a windfall (the fees always would be limited to those *reasonably* incurred), as might occur if a large fine were arbitrarily imposed and made payable to the opposing party.

As important, reliance on fee shifting imposes real restraint on the judiciary's exercise of its inherent power. The cases that acknowledge the court's inherent power to impose sanctions after a finding of bad faith also insist that that power be "exercised with restraint and discretion." *Roadway Express, supra,* at 2463, and suggest that such sanctions not exceed the fees reasonably incurred by the victim of the bad faith. See *United States v. Blodgett, supra,* at 610-611. These limits and restraints are thought necessary because the exercise of inherent judicial power is normally "shielded from direct democratic controls," *Roadway Express, supra.* Unlike courts imposing arbitrary fines, courts imposing sanctions based on the shifting of

fees work within real boundaries (expenses *actually and reasonably* incurred) and are subject to meaningful, rational checks at the appellate level.

The requirement of restraint that attaches generally to the use of inherent judicial power is intensified in cases like the one at bar, where the target of the sanctions motions is an organization with a high visibility political profile that has undertaken litigation in order, at least in part, to advance policies or ideas that are controversial in some quarters and that do not, in some areas, command the support of the current political majority. There is a greater risk in this kind of sensitive setting than in others that the personal or political views of the court will either compromise the dispassion of the judging process or appear to compromise that dispassion.

These risks, however, cannot justify retreat by the court from its sworn duty to judge, or from its fundamental institutional obligation to protect the integrity of the judicial process and parties who are innocently victimized by bad faith misuse of that process. See *Perez v. Velez*, 629 F.Supp 734 (S.D.N.Y. 1985) (also a case involving sensitive political and constitutional matters). We are acutely aware of the real tension between important competing values that inheres in motions of the kind pressed by defendants. The recommendations that follow reflect our best effort to steer a principled course between the values and interests that are in conflict here, i.e., to apply the law.

The first amendment/law reform issues warrant an additional comment here. No litigant should be penalized for a good faith, straightforward effort to extend, modify,

or reverse the course of the law. Reasonable people may disagree about what the law is or ought to be, and it is imperative to the vitality of our democracy that individuals be afforded fair opportunities to try to persuade those who fix the terms of the law to change them. If PLF had engaged in a straightforward effort to change the law, there would be no occasion for these sanctions proceedings. That is not the course, however, that PLF chose to pursue. Instead, it attempted to contort what could have been a relatively straightforward case into a massive, complex, conceptually dense, expensive litigation, and, along the way, persisted in pursuing theories (antitrust and procedural due process) for which there was simply no credible factual support.

Citing authorities construing Rule 11, PLF argues that the sole purpose of sanctions in an environment like this is deterrence, and that deterrence may not be served by fee shifting sanctions (or, more specifically, as discussed below, sanctions that include "fees on fees"). It is not at all clear, however, that even under Rule 11 the sole purpose of sanctions is deterrence. Nor, as discussed above, is it clear that deterrence and compensation are mutually exclusive, or that in deciding what kind of sanction would best serve deterrence purposes courts should ignore, even in the Rule 11 context, the magnitude of the economic harm caused by the kind of conduct sought to be deterred. Perhaps most important, the District Court in this case is not relying on Rule 11 in imposing sanctions, and the Supreme Court cases (cited above) that squarely acknowledge the inherent authority to shift fees on a finding of bad faith strongly suggest that that authority exists independent of rules or statutes and

is not cabined, in this context, by either. *Roadway Express*, for example, suggests that inherent authority is an independent predicate for the imposition of sanctions that could support fee shifting even in the absence of statutory (in that case 28 U.S.C. §1927) or rule-based (in that case Federal Rule of Civil Procedure 37) power to do so.

The United States Court of Appeals for the 5th Circuit recently endorsed this view, squarely, after considering the matter at greater length, by far, than any other court (at least insofar as such consideration is reflected in published opinions). In *Nasco, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696 (5th Cir. 1990), cert. granted, *Chambers V. Nasco, Inc.*, 111 S.Ct. 38 (October 1, 1990), the court held that federal district courts retain inherent power to impose fee shifting sanctions when the litigation process has been abused in bad faith even in circumstances where no such power is conferred by either a Federal Rule of Civil Procedure or a statute (state or federal). That same conclusion is at least implicit in the district courts' opinions in *Nasco, Inc. v. Calcasieu Television and Radio*, 124 F.R.D. 120 (W.D.La. 1989) and *Perez v. Velez*, 629 F.Supp. 734 (S.D.N.Y. 1985).

For all the reasons set forth above, we conclude that the district court has inherent power to impose a restrained fee shifting sanction and that that form of sanction is appropriate in this case.

The propriety of including "fees on fees" in the sanction.

PLF has suggested (see page 22 of PLF's brief filed on August 17, 1990) that *Cooter & Gell, supra*, also precludes the district court from including in a sanctions award all

or part of the fees defendants incurred in briefing (at the district court level, not on appeal) the sanctions issues and presenting evidence in support of their requests for fees. *Cooter & Gell*, however, says nothing about the "fees on fees" issue, and the policies that inform the Supreme Court's opinion in that case focus on preservation of an appropriate environment for parties to decide whether to lodge appeals, not on the quite separate issues that inform decisions about whether to include in sanctions awards at the trial court level some factor for the time and effort parties are required to expend in order to protect themselves (through motions for sanctions) from abuse of the litigation process at the trial court level and to provide the district court with the information it must have to make an informed, reasoned decision about whether to impose sanctions and, if so, in what form and/or amount. Thus we must look to cases other than *Cooter & Gell* for guidance on the "fees on fees" issue.

Given the authorities discussed in the preceding section, this is not a particularly difficult question. If, as it appears, one of the purposes of fee shifting in this context is to protect the victim of bad faith abuse of the judicial process from the most direct economic harms caused thereby, and if those harms include the expenses necessarily incurred in prosecuting a motion to recover fees, it follows that the court has inherent power to make a reasonable "fees on fees" award as part of a sanction. Our conviction in this matter is reinforced by the fact that fees on fees have been approved in at least three published opinions involving exercise of inherent power: *Nasco, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 706 (5th Cir. 1990); *Nasco, Inc. v. Calcasieu Television and Radio,*

Inc., 124 F.R.D. 120, 133-134 and 143 (W.D.La. 1989); and *Perez v. Velez*, 629 F.Supp 734, 738 (S.D.N.Y. 1985).

General approach to fixing the size of the sanctions.

Consistent with the principles described above, we have adopted the following general approach (specifics follow) to fixing the size of the sanctions here. We have attempted to shift to PLF most of the fee expenses that we believe defendants reasonably should have incurred in responding to the specific litigation conduct by PLF that the court has adjudged to have been committed in bad faith. We have attempted not to shift fees for work defendants would have had to do in any event, i.e., in response to those aspects of the litigation as to which no finding of bad faith has been made. Because of the restraint the law commands us to exercise when relying on inherent judicial power, and because of the political sensitivity/first amendment implications of PLF's position in this case, we have declined defendants' requests for interest and a multiplier, and we have attempted to understate, to a modest extent, both the hours and the rates reasonably billable to sanctionable conduct.

MECHANICS OF CALCULATIONS

Because only some aspects of PLF's litigation conduct were undertaken in bad faith it is necessary to attempt to apportion reasonable defense expenses. That task of apportionment has been made difficult by two related facts. The first is that in its pleadings, PLF has densely interwoven (in part by the device of incorporation by reference) various allegations and theories, has presented

some matters obscurely, and has reached out to challenge an almost unlimited number of decisions and acts by the defendants, many of which were identified either tardily or never. The second fact, attributable in no small measure to the first, is that in logging their time and preparing their billing records defense counsel did not break the litigation into the kinds of conceptual pieces that would permit a straightforward mechanical allocation of fees only to that conduct, or to those causes of action, that now have been deemed sanctionable by the court. In short, there is substantial blurring (between aspects of the litigation that are sanctionable and aspects that are not) in the way plaintiffs have presented their case and in the work done and the time records kept by defense counsel.

These facts have made it impossible (for the most part) for the court to work directly from the defendants' billing records to determine the number of hours spent on those aspects of the case that PLF pursued in bad faith. Unable to proceed in this most obvious manner, the master has been forced, in an effort to be fair, to attempt the difficult task of reconstructing what each petitioning defendant reasonably had to do in response to the sanctionable conduct by PLF. Toward that end, the master has gone through each document in the more than 30 court files (supplemented by about three feet of additional material in expando folders) that make up the record in this case, attempting (where possible) to isolate those parts of each that were responsive to or occasioned by sanctionable conduct and to estimate (conservatively) the amount of time it would have taken a reasonably competent attorney to complete the work thus isolated. Often it was impossible to isolate discrete parts of a particular

undertaking that were attributable to or occasioned by only sanctionable conduct. In those instances, we have determined the number of hours for which compensation is due by using percentage formulae (explained below) which reflect our judgment about how much of the case at a given point in its evolution, or how much of a particular pleading or paper to which response was being made, was infected by sanctionable conduct.

In apportioning time to sanctionable conduct where there is no obviously mechanical basis for separating work (in a given paper filed by defendants) responsive to such conduct from work responsive to other aspects of the litigation, we have concluded that about 40% of the case *as pled* in the original complaint was devoted to sanctionable causes of action (sounding in procedural due process or antitrust). Of the 109 paragraphs (not counting the prayers for relief) in the original complaint, 39 were devoted to jurisdictional and venue matters or to allegations made applicable generally (through subsequent incorporations by reference) to every one of the claims presented. Of the remaining 70 paragraphs, 39 were devoted to the sanctionable antitrust claims (related to the alleged property development or tourist accommodation markets) and one was devoted to the sanctionable procedural due process claim. The antitrust claims were conceptually dense, requiring substantial legal resources to analyze and counter. Because PLF pled every cause of action in the original complaint against each and every defendant named in that pleading, we can fairly find that about 40% of the claims that each defendant faced in this early stage of the case were sanctionable.

The situation is more complex with respect to the amended complaint, in part because PLF proliferated (to 16) the number of causes of action (claims) it pressed and in part because not all of the defendants were named under each claim. BCPUD was constrained to respond to the largest number (13) of these reformulated causes of action. Paul Kayfetz, Doris LeMieux, Diana Lopez Farnsworth, and Jack McClellan were named next most frequently, clearly being called to respond to 9 claims and apparently to a tenth (for reasons wholly unclear, PLF did not indicate who the defendants were to the 13th claim, which alleged a conspiracy to monopolize the Bolinas property development and tourist trade markets in violation of the antitrust laws; but since these four persons, along with BCPUD, were the named defendants in the 12th claim, which sounded similarly in allegations of conspiracy to restrain trade in the same markets, it would have been reasonable for these defendants to infer that they also were targets of the 13th claim). Penetrating the dense verbiage of the amended complaint as best we can, we conclude that BCPUD, Kayfetz, LeMieux, Farnsworth, and McClellan faced an essentially similar array of claims in the amended complaint.

Of the 212 paragraphs in the amended complaint (not counting the prayers for relief), 43 were devoted to jurisdictional and venue matters or to allegations made applicable generally (through subsequent incorporations by reference) to each of the 16 claims for relief. Of the remaining 169 paragraphs, about 30 related to the sanctionable procedural due process claims, another 38 related to sanctionable antitrust claims (property development or tourist accommodations markets), and seven

were devoted to the inverse condemnation claim that the district court has found PLF intentionally presented in a needlessly protean and obscure manner. The pleading commitments made by PLF to these matters, considered in light of their relative conceptual density and factual obscurity, amply justifies the conclusion that, before the district court acted in January of 1984 on the motions to dismiss, about 40% of the claims pressed by PLF through the amended complaint against BCPUD, Kayfetz, LeMieux, Farnsworth, and McClellan were sanctionable. After Judge Williams dismissed the antitrust claims in January of 1984, however, the percentage of the pled case against these defendants that was devoted to sanctionable claims dropped appreciably. Given the fact that the court decided to treat the claims that PLF formally cast under the first amendment as in fact sounding in procedural due process, we conclude that essentially 20% of the case as pled against these defendants after dismissal of the antitrust claims was devoted to sanctionable claims. While the court has found bad faith in the prosecution by PLF of the procedural due process claims, it has declined to make such a finding with respect to the other claims that PLF continued to press against these defendants after the court's order granting in part the motions to dismiss: temporary and permanent takings, inverse condemnation, and denial of equal protection and substantive due process rights.

The other defendants whose motions for sanctions are under consideration here (Amoroso, Niman, Schell, Weston, and Harris) were named in four of the claims that PLF pressed in its amended complaint. If we assume that none of the defendants in this latter group were

required to respond to the antitrust allegations of the 13th claim, their situation differed materially from the situation faced by the defendants discussed in the preceding paragraph in that they were not named in any of the antitrust causes of action. Thus, even before the district court dismissed the antitrust claims in January of 1984, the amended complaint advanced against the defendants in this group only one clearly sanctionable cause of action, the one sounding in procedural due process. Stripped to their essentials, the other claims that PLF included in the amended complaint against these defendants invoked three other norms: equal protection, substantive due process, and the prohibition against taking without just compensation. But unlike the defendants discussed in the preceding paragraph, the defendants in this group had to contend with the takings clause only through allegations of conspiracies, not through the additional allegations that they committed acts which directly constituted takings. Moreover, this group of defendants was not required to respond at all to the inverse condemnation claim pressed so by plaintiffs Holter and Mesa Ranch against BCPUD, Kayfetz, LeMieux, Farnsworth, and McClellan. Given all these considerations, we have concluded that from August 4, 1983, when the amended complaint was filed, essentially one-fourth (25%) of the claims pressed by PLF against defendants Amoroso, Niman, Schell, Weston, and Harris were sanctionable.

The aspects of this litigation that the court has found were conducted by PLF in bad faith, however, reach beyond the pursuit of claims sounding in antitrust and procedural due process. The court also has found bad faith in PLF's failure to comply with Judge Williams'

explicit order to set forth in the amended complaint, for each defendant, the specific acts that allegedly supported each separately pled cause of action. That failure made it more difficult and expensive for the defendants to develop certain of their defenses and to determine how best to defend themselves. Bad faith also attached to the mercurial presentation of the inverse condemnation claims on behalf of Holter and Mesa Ranch, to the reversal of position on a key component of abstention analysis, and to one aspect of a motion to strike. In ways specified in the sections that follow, we have factored these aspects of PLF's handling of this litigation into the determination of appropriate sanctions.

In subsequent sections of this report and recommendation we set forth separately for each defendant (or group of jointly represented defendants) the details of the bases for our determination of the appropriate amounts of sanctions. For each petitioning defendant we have divided our calculation of awardable fees into four subsections: (1) reasonably spent hours directly reflected in or directly inferable from docketed papers, for the period from the filing of the original complaint through entry of summary judgment (November 1987); (2) for the same period, hours we believe it would have been reasonable to spend on matters not directly reflected in or directly inferable from docketed papers; (3) hours reasonably spent by a "second chair" lawyer; and (4) hours reasonably spent prosecuting the motions for sanctions. A few words about the second and third of these categories are in order before proceeding.

Even in a case like this, which was law-dense and dominated formally by motion work, and in which the

sanctionable causes of action were eliminated by rulings on motions before substantial discovery was undertaken and without evidentiary hearings, by no means all of what lawyers reasonably due in representing their clients is visible in documents that are filed in court. Counsel must interview and confer with their clients, they must direct the collection of documents, then analyze them, they must interview persons with knowledge related to the substance of the action, they must formulate strategies, they must confer and coordinate their activities with co-defendants (of whom there were many in this case), and they must read (and, sometimes, analyze and/or probe through independent research) memoranda prepared and papers filed by co-parties. Thus, for each petitioning defendant the master has estimated the time counsel reasonably would have devoted to work not directly reflected in or inferable from papers docketed in the court's file, then has apportioned an appropriate percentage of such work to sanctionable conduct.

In addition, given the complexity and the time demands of a case like this, it was reasonable for each law firm that represented one or more defendants to have a second lawyer keep up sufficiently with the case so that he or she was in a position to help meet deadlines, cover appearances, or handle communications with other counsel or clients when the lead attorney was not available. While the amount of such essentially duplicative time that reasonably could be committed to the case varied considerably as among the defendants (depending, among other things, on their proximity to the heart of the action and the relative role in the coordinated defense effort played by their counsel), we have included in each

award some apportioned hours for a "second chair" lawyer. We have not, however, awarded time for more than one lawyer for any given defendant (or group of jointly represented defendants) to participate in any given event related to or part of the litigation (e.g., a hearing or a meeting).

Before turning to the separate calculations of the awards for each petitioning defendant we should point out that in some instances the amount of time we have credited for what appears to be the same type of work, or the same litigation event, varies from party to party. These apparent inconsistencies are the product of judgments made, one at a time, for each event and each party, that are based on a constellation of factors that often was not the same as we moved from party to party, even with respect to the same litigation event. Most obviously, as discussed above, the number and complexity of the claims pressed against different defendants sometimes varied dramatically even at the same stage of the litigation. Somewhat more subtlely, there could be considerable differences between defendants in roles allegedly played in events giving rise to claims, or in the nature, specificity, and number of factual allegations to which response was necessary. In addition, the quality or amount of work reflected in filings directed to the same issue could vary appreciably from party to party. And some lawyers represented three individual defendants, some two, some one, while the Orrick Office represented a political entity; the complexity of some tasks and the demands of communication and coordination obviously varied directly with the number and character of the clients being represented. We also point out that in some

instances it was clear from filed papers that one law firm pulled the lead oar in a particular undertaking. Sometimes papers filed by some defendants tracked or repeated substantial portions of papers filed by other defendants on the same issue. Moreover, sometimes papers filed by one defendant largely repeated matter that that same defendant had presented in an earlier filing. These and other variables informed our judgments about how much time to credit for given aspects of litigation work; we have attempted to make each such judgment both event-specific and party-specific.

Finally, we squarely acknowledge that there is some arbitrariness in the apportionment process we have used and some risk that we have misjudged the amount of time competent attorneys would need to accomplish the various tasks identified below. The possibility also exists that in a relatively few instances we may have determined that more time could reasonably have been spent on a particular matter than the entries on the time sheets indicate the lawyers actually billed their clients. Some such inconsistencies are virtually inevitable, given the nature of the task we have undertaken, the density of the billing records that have been submitted to us, and the imprecision of the process of recording time for work done on litigation like this. We feel constrained to emphasize here, however, that in making our judgments about hours, we have attempted, in the spirit of restraint imposed by the law, to be conservative, and we strongly suspect that in most instances we have underestimated the time actually spent and fairly attributable to the sanctionable conduct. And while we acknowledge that reasonable people could disagree with our judgments, and

that there may be errors in some of our specific hour attributions, we believe that the fundamentals of the process we have undertaken are fair to both sides and are consistent with the case law directives within which we are working. We struggle here with a human/social process. Absolute scientific precision with respect to each detail is not possible. We believe, however, that, in the aggregate, what we have done conforms with the mandates of due process and our oath of office.

CALCULATING THE AWARD FOR BCPUD

Counsel for BCPUD played the lead role in defense of this action. They handled much of the coordination required in a multi-defendant case like this, and did a great deal of research and writing on which other defendants relied. Their pivotal place in this complex case made their decision not to staff it with just one lawyer eminently reasonable. In short, the role played by counsel for BCPUD clearly justifies the conclusion that BCPUD is entitled to the largest award in response to the fee petitions.

Time awardable on the basis of docketed papers.

What follows is our effort to reconstruct from the court's file the work by counsel for BCPUD that is reasonably attributable to sanctionable conduct. The estimated hours reflect an intentionally conservative judgment, built both from the extent and quality of the work actually reflected in the docketed papers and the master's

views about how much time a competent lawyer should have taken to complete the tasks in question.

The figures in the left hand column reflect hours (or fractions thereof) credited *after* the apportionment; e.g., if the apportionment percentage is 40% and the figure in the left hand column is .4, we have estimated (erring on the conservative side) that it would take a competent lawyer 1.0 hour to complete the work in question.

1.5 Coordinate with other counsel and prepare stipulations to extend time to answer or otherwise respond to the original complaint and participate in telephone conference re same (late 1982, early 1983). Apportion: 40%.

3.0 Re motion to dismiss filed 3/30/83: read and analyze 38 page complaint with eight separate causes of action and draft challenges to its alleged vagueness, overbreadth, and conclusory character. Apportion: 40%.

2.0 Re motion to dismiss filed 3/30/83: research and draft challenge to due process claim. Apportion: 50% (equally divided between substantive and procedural due process, only the latter claim being sanctionable).

5.0 Re motion to dismiss filed 3/30/83: research and draft sections attacking the constitutional causes of action on grounds of legislative immunity. Apportion: 25% (at this stage, PLF pressed for relief for plaintiffs under essentially four different constitutional norms: the clause prohibiting takings without just compensation, the

equal protection clause, and the two dimensions of the due process clause: substantive and procedural; the court has ruled that bad faith attached only to pursuit of relief under the procedural due process norm).

3.0 Re motion to dismiss filed 3/30/83: research and draft sections attacking the constitutional causes of action on statute of limitations grounds. Apportion: 25%.

20.0 Re motion to dismiss filed 3/30/83: research and draft sections attacking the antitrust causes of action. Involved development of several different legal theories, all conceptually demanding. Apportion: 100%.

10.0 Read and analyze plaintiffs' 36 page opposition to motion to dismiss; research and draft Reply (April-May 1983). Apportion: 40%.

2.0 Research and draft opposition to plaintiffs' motion to strike (May 1983). Apportion: 100%.

.5 Coordinate among all counsel and court, then notice change in date for hearing on motion to dismiss. Apportion: 40%.

2.0 Prepare for and attend hearing on motion to dismiss (6/22/83). Apportion: 40%.

.5 Coordinate stipulated extension of time to respond to amended complaint (August 1983). Apportion: 40%.

18.0 Read and analyze 59 page amended complaint; research and draft second motion

to dismiss (filed 10/12/83). Apportion: 50% (about half of this motion was directed toward sanctionable aspects of the amended complaint, including antitrust causes of action [other than the Holter/Mesa Ranch claim re the alleged water development market], procedural due process, first amendment [treated as procedural due process], vagueness and failure to specify alleged acts on which the causes of action were predicated).

5.0 Read and analyze plaintiffs' 58 page opposition to second motions to dismiss. Apportion: 50% (about half of this opposition relates to sanctionable aspects of the amended complaint).

6.0 Research and draft reply to plaintiffs' opposition to motion to dismiss. Apportion: 50%.

2.5 Prepare for and attend hearing on second wave of motions to dismiss (12/2/83). Apportion: 50%.

3.0 Analyze court's opinion and order ruling on motions to dismiss; prepare 32 page answer to amended complaint (answer filed March 1984). Apportion: 20% (by this time the court had dismissed all of the antitrust causes of action and all claims/allegations that did not specifically concern the enactment and enforcement of the moratorium on new water hook-ups).

1.0 Read and analyze Morganstein's motion to intervene and coordinate re-scheduling the hearing on that motion (July-August 1984). Apportion: 20% (the theory that

supports including credit in the sanctions award for a modest percentage of the time spent on this matter is that but for PLF's pursuit of this action, of which at this juncture, vis-a-vis BCPUD, some 20% was devoted to sanctionable claims, there would have been no action in which Morganstein could have tried to intervene; moreover, one of the substantive predicates for his complaint in intervention tracked in essence the sanctionable procedural due process claims that PLF continued to press).

3.0 Analyze plaintiffs' responses (in two stages) to defendants' contention interrogatories (latter part of 1984—mid-1985). Apportion: 30% (while only about 20% of the case *as pled* against BCPUD at this juncture was devoted to sanctionable claims, it was in large measure because of PLF's bad faith failure to comply with Judge Williams' order requiring the amended complaint to set forth specifically, and separately for each defendant, the factual basis for each claim, that resort to contention interrogatories like these was necessary).

1.5 Research and draft opposition to Morganstein's motion to intervene (filed 8/1/84). Apportion: 20%.

.4 Prepare for and attend hearing on Morganstein's motion to intervene (10/17/84). Apportion: 20%.

1.0 Coordinate rescheduling of, prepare for and attend status conference (5/15/85). Apportion: 20%.

.2 Analyze and prepare objection to plaintiffs' request for production of documents (request filed in July 1985). Apportion: 20%.

2.5 Analyze plaintiffs' motion for abstention and reply papers re same; research and draft response thereto; coordinate rescheduling of, prepare for and attend two hearings re said motion (August 1985--March 1986). Apportion: 20% (while PLF's reversed positions in bad faith with respect to one element of abstention analysis, that reversal does not warrant shifting to PLF all fees incurred by defendants in responding to the motion, which, on the merits, cannot be characterized as frivolous; at this juncture, only about 20% of case as pled against BCPUD remained sanctionable).

3.0 Prepare for (analytically and by coordinating strategies with other counsel and parties) and attend settlement negotiations in the spring and early summer of 1986. Apportion: 20%.

.5 Coordinate rescheduling of status conferences (June 1986—March 1987). Apportion: 20%.

1.0 Analyze and respond to plaintiffs' renewed motion for abstention (January--March 1987). Apportion: 20%.

1.0 Analyze and respond to plaintiffs' motion to dismiss claims by plaintiffs' Holter and Mesa Ranch (January 1987). Apportion: 20% (through the device of incorporation by reference, as well as separate claims,

PLF continued to allege procedural due process claims on behalf of these plaintiffs against defendants; moreover, PLF's presentation of these plaintiffs' inverse condemnation claims remained mobile and obscure).

.7 Draft status conference statement and read statements submitted by other parties; attend status conference on 3/4/87; prepare for and argue motions on same date. Apportion: 20%.

1.5 Research and draft motion for summary judgment as against plaintiffs Holter and Mesa Ranch (filed 5/20/87). Apportion: 20%.

3.5 Research and draft motion for summary judgment as against all plaintiffs on due process and inverse condemnation causes of action (filed 5/20/87). Apportion: 50% (one of two of plaintiffs' due process theories was sanctionable [procedural due process] and the inverse condemnation cause of action had been presented in a manner that made determining what it was, and understanding it, needlessly difficult).

.1 Respond to plaintiffs' request for production of documents. Apportion: 20%.

2.5 Analyze plaintiffs' papers (totaling about 30 pages of briefing, accompanied by exhibits and declarations) filed in opposition to defendants' motions for summary judgment as to plaintiffs Holter and Mesa Ranch and, as to all plaintiffs, on the due process and inverse condemnation claims.

Apportion: 30% (approximate weighted mean).

1.3 Analyze and respond to yet another renewal of plaintiffs' motion for abstention (papers include plaintiffs' 46 page proposed state court complaint; prepare for and attend hearing on same (9/16/87). Apportion: 20%.

2.0 Draft detailed analysis of "evidence" PLF submitted in connection with plaintiffs' opposition to defendants' motions for summary judgment. Apportion: 20%.

1.0 Research and draft reply brief in support of motion for summary judgment re plaintiffs' Holter and Mesa Ranch. Apportion: 20%.

.7 Research and draft reply brief supporting motion for summary judgment against all plaintiffs on the inverse condemnation and due process claims (filed 9/9/87). Apportion: 20% (most of the substantive discussion deals with the taking claim, which is not sanctionable).

4.0 Research and draft separate motion for summary judgment re procedural due process claim (filed 9/25/87). Apportion: 100%.

.4 Respond to plaintiffs' objections to defendants' request for judicial notice and supplementary submissions of documentary support. Apportion: 20%.

5.0 Analyze plaintiffs' opposition to motion for summary judgment on procedural due

process claims; research and draft reply in support of that motion. Apportion: 100%.

.7 Analyze and draft response to yet another renewal of plaintiffs' motions for abstention and dismissal (September—October 1987). Apportion: 20%.

.6 Prepare for and attend hearings (10/7/87) on defendants' motions for summary judgment on inverse condemnation, substantive due process, and procedural due process and on plaintiffs' renewed and modified motions for abstention and dismissal. Apportion: 20%.

.4 Analyze Holter declaration and draft objections to it. Apportion: 20%.

.2 Prepare supplemental submissions in support of request for judicial notice (October 1987). Apportion: 20%.

.2 Oppose taking of depositions noticed by PLF for October and November, 1987 (includes participation in telephone hearings re same). Apportion: 20%.

On November 16, 1987, the District Court granted defendants' motions for summary judgment and ordered entry of judgment in their favor, thus ending (temporarily) the adjudication of the merits of this case at the district court level.

123.9 Subtotal of awardable hours directly reflected in or inferable from docketed papers, through entry of summary judgment.

Time awardable for work reasonably done on matters not reflected directly in docketed papers and not inferable directly therefrom.

We turn at this juncture to the task of attempting to estimate fairly and conservatively the number of hours counsel for BCPUD reasonably should have spent on matters not directly reflected in or directly inferable from the papers docketed in the court's file. These matters include coordinating and communicating with counsel for other parties, interviewing/conferring with clients and other persons with knowledge (of whom there were many, in part because the allegations reached conduct connected with every person who had been on the BCPUD board or the Bolinas Planning Council over a period of more than a decade), collecting and studying documents (including all relevant records of the board over a period of a decade), formulating strategies, and reading and analyzing briefs, memoranda, and exhibits prepared and submitted by co-defendants (of whom there were many in this case). Because the apportionment figures are different for the two periods, we have formulated separate estimates for the period between November of 1982 and January of 1984 and for the period between February of 1984 and November of 1987.

For the period between November 10, 1982, when the original complaint was filed, and January 20, 1984, when the district court dismissed with prejudice all the antitrust claims (as well as some other parts of the case), approximately 40% of the claims being pursued were

sanctionable. During this period PLF also persisted in obscuring and changing the Holter-Mesa Ranch inverse condemnation claim and violated Judge Williams order that directed PLF in the amended complaint to set forth, separately for each defendant, the specific acts allegedly committed that supported each claim. The failure to follow Judge William's order needlessly made it more difficult for the court and defendants to analyze the case and to handle efficiently its pretrial development. Taken together, the sanctionable conduct by PLF during this period justifies shifting 50% of the fees reasonably necessary for this kind of work by counsel for BCPUD, who played the lead role in the coordinated defense effort. Thus, we use a 50% apportionment figure for the period between November 1982 and January 1984.

During the period between February of 1984 and November of 1987, when the district court ordered entry of judgment in favor of defendants, only about 20% of the claims being pursued by PLF were sanctionable (procedural due process). However, during this period PLF also continued to obscure the character of and the predicates for the Holter-Mesa Ranch inverse condemnation claims, left unclear (even after supplementing answers to interrogatories) the factual bases for some of its allegations, reversed its position on a crucial component of *Pullman* abstention analysis, and pressed a patently frivolous position on a motion to strike. Taken together, the sanctionable conduct by PLF during this period justifies shifting 25% of the fees for reasonably necessary work by counsel for BCPUD that is not directly reflected in or directly inferable from docketed papers.

November 1982---January 1984. Apportion: 50% (the figures in the left hand column reflect half of the time we estimate counsel for BCPUD reasonably would have devoted to the matters separately described).

50.0	Interviewing clients and other persons with knowledge; conferences (telephone) and meetings with clients re substance and strategy; updating clients re procedural developments.
50.0	Directing the collection of and analyzing documents.
40.0	Exploring alternative strategies; coordinating work and mechanics with other defense counsel; conferring with counsel for other defendants re legal theories, facts and evidence.
20.0	Analyzing papers (briefs, exhibits, declarations, etc.) filed by other defendants.

February 1984—November 1987. Apportion: 25% (the figures in the left hand column reflect 25% of the time we estimate counsel for BCPUD would have devoted to the matters separately described). During this period there were fewer parties, fewer claims, and some long hiatuses between major events in the litigation. Moreover, counsel was in a position to capitalize on the more intensive investments in learning made during the first 13 months of the life of the case.

25.0	Acquiring additional information from and conferring with clients; updating clients on developments.
20.0	Directing the collection of and analyzing documents.

18.0 Exploring and formulating strategies; coordinating work and mechanics with counsel for other defendants; conferring with counsel for other defendants re legal theories, facts, and evidence.

6.0 Analyzing papers filed by other defendants.

229.0 Subtotal of apportioned hours for work not directly reflected in or directly inferable from docketed papers.

Time awardable for "second chair" lawyer.

We next determine the number of hours that it would be reasonable to have a second lawyer commit to this case on behalf of BCPUD, in addition to the hours credited in the preceding sections, so as to be in a position to cover for the lawyer primarily responsible and to help meet deadlines. We decline to award any time for "double appearances" by counsel for BCPUD (or for any other defendant), i.e., for instances in which more than one lawyer representing the same party attended a hearing, meeting, settlement negotiation, etc. We do not understand why more than one lawyer would be required at any such event. We have factored into the hours awarded here, however, a modest allocation of time for brief oral reports by one lawyer to the other(s) involved in the case on behalf of the same party.

In our view, it would be reasonable for a second lawyer representing BCPUD to spend 50 hours in essentially duplicative work during the November 1982—January 1984 period and another 50 such hours in the period

between February of 1984 and November of 1987. Applying the 50% apportionment figure for the first period and the 25% apportionment figure for the second period, we *credit BCPUD with an additional 37.5 hours of attorney time.*

37.5 Subtotal for "second chair" lawyer time.
Time awardable for pursuit of sanctions ("fees on fees").

Because we have concluded (as explained above) that it is appropriate to include conservatively calculated "fees on fees" in the sanctions for which defendants have moved, in the section that follows we set forth our perception of the work that it was reasonable for counsel for BCPUD to have done in the prosecution of the attorneys' fees motion, estimate the time a competent lawyer would commit to each component of that work, and make an apportionment that reflects our judgment about the how much of the time so committed can fairly be attributed to conduct by PLF that is sanctionable.

It is not appropriate to shift to PLF all of the fees that BCPUB reasonably incurred in prosecuting the sanctions motion in part because BCPUD was only partially successful in the sanctions proceedings. Originally BCPUD sought, through its motion for sanctions, to recover all the fees it had incurred in the litigation, arguing that PLF had pursued all aspects of the litigation in bad faith and that every claim was vapid and frivolous. Ultimately, the court decided that only some of the claims were pursued in bad faith (in addition, the court concluded that some of the means PLF used in prosecuting the case were infected with bad faith). Since only a portion of PLF's conduct was sanctionable, BCPUD should be awarded fees on only an

equivalent portion of the work committed to pursuing sanctions.

We have used the concept of a "weighted mean" to arrive at an overall figure that fairly reflects the percentage of the work that was done on behalf of BCPUD prior to entry of summary judgment that was attributable to sanctionable conduct by PLF. Our calculation of the weighted mean is based on the following findings from the preceding sections of this report: 8% (31.0 hours) of the time awardable on behalf of BCPUD through entry of summary judgment was spent at the 100% apportionment rate, 57% (222.0 hours) was spent at the 50% apportionment rate, 4.5% (17.5 hours) was spent at the 40% apportionment rate, 1.5% (5.5 hours) was spent at the 30% apportionment rate, 23% (89.5 hours) was spent at the 25% apportionment rate, and 6% (24.9 hours) was spent at the 20% apportionment rate. The weighted mean of these figures is 45.8%. In fixing an apportionment rate that is appropriate for the work reasonably done on behalf of BCPUD in prosecution of the sanctions motions, we have rounded the weighted mean down to 40%, in part out of deference to the first amendment/political sensitivities implicated by a case like this and in part in response to the law's command that caution and restraint be used when exercising inherent judicial authority to impose sanctions. Thus we will shift to PLF 40% of the fees that we believe counsel for BCPUD reasonably should have generated in prosecuting the motion for sanctions.

We have decided to proceed by formulating our own estimates of the reasonable number of hours that competent attorneys would devote to each part of the process of

pursuing sanctions, rather than simply accept the billings proffered by counsel, in part because the figures counsel have presented are appreciably higher than we think can be justified and in part because we feel constrained to make some downward adjustments to reflect the fact that some of the work for which time has been billed was necessary only because of what we believe were foreseeable shortcomings in the briefs and/or documentation as counsel originally presented them.

All figures in the left hand column in the section that follows are based on the 40% apportionment explained above; thus, each hourly figure (or fraction thereof) represents 40% of the time that we believe a competent lawyer reasonably would have devoted to the matters separately described.

10.0 Research and draft initial 39 page motion for fees (filed 2/16/88) (we understate these hours because the moving papers did not sufficiently distinguish the differences in norms/standards under the different potential predicates for sanctions and did not show with sufficient clarity how specific challenged conduct offended the norms being invoked).

3.0 Analyze PLF's opposition to motion for fees (accompanied by substantial "evidentiary" exhibits).

6.0 Analyze plaintiffs' separate opposition to motion for fees (60 pages of brief, plus exhibits).

.6 Read plaintiffs' opposition to the motions for fees by other defendants.

.6 Coordinate and prepare request for extension of time to reply to oppositions to motions for fees.

8.0 Research and prepare memoranda in reply to plaintiffs' oppositions to motions for fees; gather documentary exhibits and draft declarations in support of same (6/1/88) (we also understate these hours for the reasons set forth in connection with the first entry in this section).

On June 22, 1988, the District Court referred all the sanctions motions in this matter to the undersigned as special master. Because the master had no familiarity with the case (he had had no contact with it prior to the order of reference), it was necessary for the parties to prepare and file additional briefing.

1.2 Prepare for and participate in lengthy status conference and hearing before the special master (10/6/88).

.6 Prepare for and participate in follow-up status conference before special master to adjust briefing schedule and clarify how motion papers should be re-cast (10/27/88).

36.0 Research and draft four separate memoranda (totalling about 150 pages of briefing) in support of motions for sanctions; draft declarations and gather and organize extensive exhibits in support of same (filed 1/6/89).

4.0 Analyze plaintiffs' and PLF's separate oppositions to motions for fees (totalling about 80 pages of briefing, accompanied by substantial exhibits and declarations) (filed 2/13/89).

4.5 Research and draft separate replies to plaintiffs' and PLF's oppositions to the recast motions for sanctions (filed 3/6/89).

.6 Prepare for and participate in status conference with master re supplementing submissions on motions (3/14/89).

6.0 Gather and organize extensive appendices designed to support motions for fees and to equip the master (who had had no contact with the case during the earlier litigation on the merits) to understand its procedural history (71 separate exhibits, almost five inches of paper in two volumes) (filed 4/3/89).

10.0 Analyze plaintiffs and PLF's separate supplemental memoranda submitted in further opposition to motions for fees and evidentiary objections (about 140 pages of briefing and almost 3 inches of exhibits) (filed 4/3/89).

7.0 Research and draft a supplemental memorandum addressing separately the master's concerns about the First Amendment implications of sanctions in cases like this; research and draft memorandum replying to plaintiffs' supplemental opposition papers; draft declaration; draft evidentiary objections to exhibits submitted by plaintiffs on 4/3/89 (all filed 4/26/89).

3.2 Analyze master's draft findings and recommendations (almost 120 pages); prepare comments re same (latter filed 9/18/89).

2.4 Analyze PLF's and plaintiffs' separate comments (totalling about 50 pages of briefing) on master's draft recommendations (filed 9/22/89).

2.4 Analyze substantially revised, final version of master's report and recommendations re liability

phase of sanctions proceedings (filed 1/11/90; 103 pages).

.8 Analyze PLF's objections to master's final report and recommendations (filed 1/29/90).

.5 Prepare for and participate in status conference with master re second phase of sanctions proceedings (to determine nature and extent of sanctions) (6/21/90).

During the summer of 1990 counsel for BCPUD did some work in connection with the separate proceedings, initiated on the master's recommendation, against individual attorneys (as distinct from PLF as an institution). Because these separate proceedings were initiated at this late juncture as a result of an error of judgment by the master, it would be unfair to penalize PLF for expenses any defendant incurred in connection with them. Thus we recommend that no fees be shifted to PLF for this work by defense counsel. The hours awarded in the paragraphs that follow are for work related to the prosecution of sanctions motions against PLF itself.

8.0 Research and draft substantial memorandum and lengthy declarations in support of BCPUD's claim for fees (include analysis of billing/time records) (filed 7/23/90).

2.4 Analyze PLF's opposition to fee request (filed 8/17/90).

3.6 Research and draft memorandum in reply to PLF's opposition to fee request; draft declaration and submit billing documents in connection with same (filed 8/31/90).

.8 Seek clarification/modification (through letters, negotiations with other counsel, and conference

with master) of master's order of 10/25/90, requiring submission of additional documentary support for fees requests (late October 1990) (we understate the time chargeable to this work because not all of it was necessary).

1.2 Prepare supplemental declaration in support of fees request and oversee submission of additional time/billing records (filed November 5, 1990).

We recommend that there be no addition of hours for work that cannot be inferred directly from docketed papers in the period during the pendency of these sanctions proceedings. In allocating time to the various separate tasks described above we have built in modest estimates for time needed to consult with clients and co-counsel and to gather and analyze documents. Given the nature of these proceedings and the work done earlier in the case, we feel that the vast majority of the awardable time during this period should be inferable from the docketed papers.

123.4 Subtotal of awardable hours for prosecution of motion for sanctions.

Summary of calculation of awardable hours:

123.9 Hours for work directly reflected in or inferable from docketed papers through entry of summary judgment.

229.0 Hours not directly reflected in docketed papers, through entry of summary judgment.

37.5 Hours for "second chair" lawyer.

123.4 Hours for "fees on fees."

513.8 Total hours awardable to BCPUD.

Fixing an appropriate hourly rate.

The master recommends that the court use a figure of $150 per hour in calculating the fees awardable to BCPUD.

The voluminous billing records and the several declarations submitted by counsel for BCPUD show that the actual historical billing rates used in this matter ranged from $80 per hour on the low end (only a very few such hours were billed, according to the Declaration of George A. Yuhas, filed July 23, 1990) to $225 per hour on the high end. To attempt to fix the hourly rates actually billed for each hour of awardable time over the 8 years covered by this report and recommendation would take an extraordinary investment of effort by the court (and/or counsel) that probably would not yield figures in which we could have total confidence. While it appears that the vast majority of the time spent on this case was billed at a rate above $150 per hour, we recommend that the court use that figure for all the awardable hours, regardless of when actually worked, on the ground that this rate is within the range of rates that firms like Orrick, Herrington charged clients during the period in question but still is higher than the rates that other defense counsel in this case actually billed (see sections that follow) for their work on these matters.

Sanction awardable to BCPUD.

Using the figures for awardable hours and rates described in the preceding sections, we recommend that the District Court order PLF to pay to BCPUD, as a sanction in this matter, the sum of *$77,070.00* (513.8 hours at a rate of $150.00 per hour).

CALCULATING THE AWARD FOR DEFENDANT KAYFETZ

Paul Kayfetz was the lead named defendant and a high-visibility player in the activities giving rise to this lawsuit. At each stage of the litigation prior to entry of summary judgment he faced essentially the same allegations as did BCPUD. His separately retained lawyers (the firm of Bledsoe, Cathcart, Leahy, Starr & Diestel) devoted considerable time to the defense of this action, especially in the period preceding the dismissal of the antitrust claims in January of 1984. During that period, his counsel played a role comparable to that of counsel for BCPUD, pulling a lead oar in coordinating the multi-party defense effort and in researching and writing very substantial papers challenging the pleadings. The substantial work by counsel for Kayfetz during this important early period is clearly reflected in many papers filed in this action and is the principal basis for Kayfetz' fee award. In the period between February of 1984 and November of 1987, when the district court entered judgment in favor of defendants, counsel for Kayfetz played a substantially reduced, less active role, as Kayfetz relied in large measure on the work performed by counsel for BCPUD.

We have used the same methods in calculating the Kayfetz fee award that we used in calculating the fee award for BCPUD. In the interest of economy, we will not repeat explanations in this section. Rather, it suffices to say that we use the same apportionment figures here except where our examination of a particular docketed paper shows that its content or focus justifies a departure from the figure generally applicable to the stage of the proceedings in which the relevant work was done.

Time awardable on the basis of docketed papers, through entry of summary judgment.

1.2 Negotiate and coordinate arrangements for three separate extensions of time to answer or otherwise respond to the original complaint (late 1982--February 1983). Apportion: 40%.

7.0 Re motion to dismiss filed 3/30/83: analyze 38 page complaint with eight separate causes of action; research and draft section raising defense of immunity for legislative acts. Apportion: 40%.

30.0 Re motion to dismiss filed 3/30/83: research and draft lengthy, law dense section of memorandum attacking antitrust claims on several different substantive and procedural grounds. Apportion: 100%.

5.0 Analyze plaintiffs' 36 page opposition to motion to dismiss; research and draft the portion of the reply to that opposition that applies generally to all claims. Apportion: 40%.

10.0 Re reply filed 5/4/83: research and draft section devoted to antitrust claims. Apportion: 100%.

2.0 Analyze and draft opposition to plaintiffs' consolidated motion to strike (opposition filed 5/4/83). Apportion: 40%.

.5 Coordinate and notice second change in date for hearing on motions to dismiss (May 1983). Apportion: 40%.

2.0 Prepare for and attend hearing on motions to dismiss (6/22/83). Apportion: 40%.

18.0 Analyze 59 page (16 separate claims) amended complaint (filed 8/4/83); research and draft second motion to dismiss (filed 10/12/83). Apportion: 50% (this figure is based both on the failure of the amended complaint to set forth clearly the specific factual allegations that supported each claim against Kayfetz and on the approximate percentage of this motion that counsel for Kayfetz devoted to sanctionable claims, i.e., antitrust claims based on the Bolinas property development and tourist accommodation markets and the claims sounding in essence in procedural due process).

5.0 Analyze plaintiffs' 58 page opposition to motions to dismiss. Apportion: 50% (about half of this memorandum relates to sanctionable aspects of the amended complaint).

5.0 Research and draft reply to plaintiffs' opposition to motion to dismiss. Apportion: 50% (about half of this reply is devoted to sanctionable matter, i.e., antitrust and procedural due process claims, the failure of the amended complaint to set forth, for each defendant and each claim, the specific acts allegedly supporting the right to relief, etc.).

2.5 Prepare for and attend hearing on second wave of motions to dismiss (12/2/83). Apportion: 50% (see preceding 3 entries).

3.0 Prepare answer to amended complaint (includes time to review court's opinion and order in response to second motions to dismiss and determine which aspects of amended complaint remain pending). Apportion: 20% (all antitrust causes of action had been dismissed).

.4 Draft short set of contention interrogatories to plaintiffs (filed 5/9/84). Apportion: 30%.

2.5 Read interrogatories propounded to plaintiffs by other defendants and analyze plaintiffs' responses to all interrogatories (May 1984--June 1985). Apportion: 30%.

2.5 Analyze Morganstein's motion to intervene; research and draft opposition thereto (filed 10/3/84); prepare for and attend 10/17/84 hearing on Morganstein's motion to intervene. Apportion: 20%.

.4 Prepare for and attend 5/15/85 status conference. Apportion: 20%.

.3 Help coordinate and justify rescheduling of hearing on plaintiffs' motion for abstention. Apportion: 20%.

.5 Analyze plaintiffs' motion for abstention; review and join in BCPUD's opposition thereto (joinder in opposition filed 9/18/85). Apportion: 20%.

.8 Prepare for and attend two hearings (10/2/85 and 3/19/86) on plaintiffs' motion for abstention. Apportion: 20%.

1.3 Confer with other defense counsel and help coordinate posture toward and positions to take during settlement negotiations in mid-1986. Apportion: 20%.

.7 Analyze plaintiffs' renewed motion for abstention (and accompanying documents), filed 2/2/87, as well as motion for voluntary dismissal filed at the same time by plaintiffs Holter and Mesa Ranch; joinder in response filed on behalf of remaining defendants; attend hearing re same (3/4/87). Apportion: 20%.

.6 Review and join BCPUD's motions for summary judgment (filed May 20, 1987); review plaintiffs' opposition to same. Apportion: 20%.

.7 Review plaintiffs' renewed motions for abstention and dismissals, as well as related supporting documents (several filings in late summer of 1987); review and join in opposition by BCPUD; attend hearing re same on 9/16/87. Apportion: 20%.

.7 Review yet another set of papers filed by plaintiffs in support of continued effort to persuade court to abstain and dismiss; draft opposition to same (filed 9/30/89); prepare for and attend hearing re same (hearing devoted to several motions; 10/7/87). Apportion: 20%.

.8 Review additional motion for summary judgment filed by BCPUD and additional papers countering plaintiffs' responses; review additional papers filed by plaintiffs in opposition (summer and fall of 1987); join in BCPUD's additional motions; prepare for and attend 10/7/87 hearing re same. Apportion: 20%.

.2 Join in motions to continue depositions noticed by plaintiffs and telephone hearings re same (October and November 1987). Apportion: 20%.

On November 16, 1987, the district court granted defendants' motions for summary judgment and ordered entry of judgment in their favor.

103.6 Subtotal: calculation of awardable hours directly reflected in or inferable from docketed papers, through entry of summary judgment.

Time awardable for hours reasonably spent prior to entry of summary judgment on work not directly reflected in or inferable from docketed papers (see explanations in parallel section of calculation of award for BCPUD).

November 1982—January 1984. Apportionment: 50%.

20.0 Interviewing client and other persons with knowledge; conferences (telephone) and meetings with client re substance and strategy; updating client re procedural developments (in comparing the hours awarded to counsel for Kayfetz with those awarded to counsel for BCPUD, in this and related categories, we must bear in mind that counsel for Kayfetz had only one client, whereas counsel for the Board represented an institution with membership of a great many individuals spanning more than a decade).

25.0 Directing the collection of and analyzing documents.

24.0 Exploring alternative strategies; coordinating work and mechanics with other defense counsel; conferring with other defense counsel re substantive and tactical matters.

20.0 Analyzing papers filed by other defendants.

February 1984—November 1987 (during this period the role played by counsel for Kayfetz was much less active than it had been in the first phase of the litigation). Apportionment: 25%.

10.0 Acquiring additional information from and conferring with client; updating client on developments.

5.0 Directing the collection of additional documents; studying newly gathered documents and reviewing documents gathered earlier.

8.0 Developing strategies; conferring with counsel for other defendants re substantive and tactical matters.

2.0 Analyzing papers filed by other defendants (credit has been given in the section based on docketed papers, above, for time reasonably spent by counsel for Kayfetz reviewing documents filed by BCPUD).

114.0 Subtotal of apportioned hours for work not directly reflected in or inferable from docketed papers.

Time awardable for "second chair" lawyer.

Given the complex, conceptually demanding character of plaintiffs' claims in this case, given the fact that Kayfetz was the lead and highest visibility individual defendant, and given the fact that his counsel played a substantial role in the joint defense of this matter during the first phase of this litigation (November 1982 through January of 1984), it is appropriate to include in this award some allocation of hours for a second lawyer to keep abreast of the case. The hours awardable to Kayfetz in this connection should be fewer than those awardable to BCPUD, whose counsel played the lead role through the date of entry of summary judgment, but greater than those awardable to other individual defendants, whose roles were not as central, factually or sociologically, as Kayfetz'.

We have noticed (in minute orders) that Kayfetz was very often (much more than any other defendant, notably

including BCPUD) represented by two lawyers at hearings and court conferences. As noted earlier, we decline to include in our recommended award any hours committed by a second lawyer to any given event. This is one important reason that the overall award that we recommend falls appreciably short of the figure urged by counsel for Kayfetz.

For the period between November of 1982 and January of 1984 we conclude that it would be reasonable for a second lawyer to commit 30 hours on behalf of Kayfetz in essentially duplicative work; for the period between February of 1984 and November of 1987, a longer but less intensively litigated period, and one in which counsel for Kayfetz played a much less active role, it would be reasonable for a second lawyer to commit 20 hours to such work. Applying the 50% apportionment figure for the first of these two periods, and the 25% apportionment figure to the second, we determine that *Kayfetz should be credited with an additional 20 hours for "second chair" attorney time.*

20.0 Subtotal for "second chair" attorney time.

Time awardable for pursuit of sanctions ("fees on fees").

Again we use the concept of the "weighted mean" to determine the appropriate apportionment figure for work reasonably done on behalf of defendant Kayfetz in prosecution of the motion for sanctions. Our calculation of that figure is based on the following findings: 17% (40 hours) of the time awardable on behalf of Kayfetz through entry of summary judgment was spent at the 100% apportionment rate, 57% (134.5 hours) was spent at

the 50% apportionment rate, 7% (17.7 hours) was spent at the 40% apportionment rate, 1% (2.2 hours) was spent at the 30% apportionment rate, 13% (30.0 hours) was spent at the 25% apportionment rate, and 5% (13.2 hours) was spent at the 20% apportionment rate. The weighted mean of these figures is 52.85%, which we round down to 50%. Thus, we recommend that the court use a *50%* apportionment figure when calculating awardable hours for defendant Kayfetz for work reasonably committed to prosecution of the sanctions motion.

Each hourly figure (or fraction thereof) in the left hand column in the section that follows represents 50% of the time that we believe a competent lawyer reasonably would have devoted to the matters separately described.

1.8	Draft joinder in BCPUD's motion for fees and separate declaration and (short) memorandum in support thereof (filed 2/16/88).
4.3	Analyze the two opposition memoranda (filed 4/20/88) to the motions for fees on behalf of all defendants and on behalf of defendants other than BCPUD, separately submitted by PLF and by plaintiffs.
1.2	Read plaintiffs' 60 page memorandum in opposition to motion for fees by BCPUD.
.6	Read BCPUD's reply to plaintiffs' opposition to motion for sanctions.
.6	Prepare for and participate in status and scheduling conference with master re motions for sanctions (10/6/88).

.5 Prepare for and participate in second status and scheduling conference with master re fees motions (10/27/88).

3.2 Read and join BCPUD's revised motions and memoranda in support of motion for fees; draft declaration in support of same (December 1988—January 1989).

2.7 Review plaintiffs' and PLF's lengthy oppositions to motions for fees (filed 2/13/89).

.8 Review BCPUD's reply memoranda in support of motions for fees.

.5 Participate in status and further scheduling conference with master (3/14/89).

1.0 Review appendices to motions for fees prepared by counsel for BCPUD and filed 4/3/89.

2.5 Review additional memoranda and exhibits filed 4/3/89 by plaintiffs and by PLF in opposition to motions for sanctions.

.9 Review additional memoranda filed 4/26/89 by counsel for BCPUD re first amendment issues, evidentiary matters, and in reply to oppositions filed by plaintiffs and by PLF.

1.5 Read special master's draft recommendations re liability aspects of motions for sanctions (filed September 8, 1989).

.5 Read other parties comments re master's draft recommendations.

1.2 Analyze special master's final report and recommendations re liability aspects of

motions for sanctions (filed January 11, 1990).

.3 Read PLF's objections to master's final report and recommendations.

.5 Participate in status conference with master re stage two (nature and amount) of sanctions proceedings (June 21, 1990).

1.3 Research and draft memorandum and declaration supporting request for specified fees and damages by way of sanctions (filed 7/23/90).

.5 Review PLF's opposition to motion for fees (filed 8/17/90).

1.7 Read master's order of 10/25/90 requiring additional documentary support for requests for fees; read correspondence re same and participate secondarily in efforts at clarification/modification; gather and organize for submission to master extensive additional time and billing records (the latter filed November 2, 1990).

28.1 Subtotal of awardable hours for prosecution of motion for sanctions.

Summary of calculation of awardable hours:

103.6 Hours for work directly inferable from docketed papers through motion for summary judgment.

114.0 Hours for work not directly reflected in or inferable from docketed papers.

20.0 Hours for "second chair" lawyer.

28.1 Hours for "fees on fees."

265.7 Total hours awardable to defendant Kayfetz.

Fixing an appropriate hourly rate for defendant Kayfetz.

Counsel for Kayfetz has made our task of fixing an appropriate hourly rate more difficult than necessary by failing to submit billing records, with a few exceptions, that indicate what the hourly rates being charged were, by failing to submit a declaration setting forth such rates (at the various relevant junctures over the life of the case), and by failing to submit time sheets for the period after December 31, 1987. By doing considerably more adding and dividing than should have been required, however, we have determined that the rate actually charged by counsel for defendant Kayfetz during the period in which the vast majority of the awardable time was spent (1983-1984) was $75.00 per hour. The historical charging rate appears to have increased at some later juncture to $85.00 per hour, then risen again to $95.00 toward the end of the period for which time sheets have been submitted. Given that the center of gravity of these figures clearly is $75.00 per hour, given the failure to submit evidence sufficient to support findings for hours billed after 1987, and given the command of the law that we err on the conservative side in these kinds of calculations, we recommend that the figure of $75.00 per hour be used for all of the time awardable to defendant Kayfetz.

Sanction awardable to defendant Kayfetz.

On the basis of the figures for awardable hours and rates described in the preceding sections, we recommend

that the district court order PLF to pay to counsel for defendant Kayfetz (to be credited to the account in this case) the sum of *$19,927.50* (265.7 hours at $75.00 per hour).

CALCULATING THE AWARD FOR DEFENDANTS LeMIEUX, FARNSWORTH (LOPEZ), AND McCLELLAN

These defendants appeared *in pro per* until the latter part of 1983, when the law firm of Howard, Rice, Nemerovski, Canady, Robertson & Falk (referred to hereafter as "Howard, Rice") agreed to represent them on a *pro bono* basis. Even though these three defendants faced in essence the same claims as did BCPUD and Kayfetz, it is clear from the papers docketed over the course of this litigation that they were not dominant players in this litigation drama and that their counsel did not play lead roles in the coordinated defense effort. It also is clear, however, that counsel for these defendants in fact devoted a not insignificant amount of time to this matter. The fact that that time, which is a litigator's principal asset, was committed on a *pro bono* basis should not disqualify counsel for these defendants from a fee shifting award for hours reasonably spent responding to sanctionable conduct.

In fixing apportionment figures and calculating awardable attorney time, we use, as applicable, the same methods we used in the preceding sections of this report and recommendation.

Time awardable on the basis of docketed papers, through entry of summary judgment.

.4 Analyze district court's order and opinion responding to motions to dismiss (January 1984). Apportion: 20%.

.6 Prepare ex parte application to extend time to respond to amended complaint and participate in telephone conference with court re same (opposed by PLF). Apportion: 20%.

3.0 Analyze amended complaint in light of court's ruling of 1/20/84 in response to motions to dismiss; research and draft 30 page answer to amended complaint (first answer filed March 19, 1984, after court had dismissed antitrust claims). Apportion: 20%.

1.7 Oversee preparation of seven identical sets of interrogatories (one per plaintiff, all filed May 24, 1984; same questions propounded by some other individual defendants). Apportion: 30%.

1.6 Analyze plaintiffs' answers to interrogatories (answers cover some 230 pages, but are insubstantial, to say the least, with respect to a great many questions; June 1984--June 1985). Apportion: 30%.

.7 Analyze Morganstein's motion to intervene; review and join in opposition filed by BCPUD; attend hearing re same (10/17/84). Apportion: 20%.

.3 Prepare for and attend status conference on May 15, 1985. Apportion: 20%.

.8 Analyze plaintiffs' motion for abstention (filed 8/2/85); review and join response thereto filed by BCPUD (joinder in response filed 9/18/85); review plaintiffs' reply; attend hearing (10/2/85) on this motion. Apportion: 20%.

.5 Review additional filings re abstention issue and attend another hearing re same (3/19/86; status conference also held same date). Apportion: 20%.

.8 Review docketed papers re motions by plaintiffs to dismiss and renewed motion for abstention; prepare for and attend hearings re same, as well as status conference (3/4/87). Apportion: 20%.

.5 Review still more docketed papers re plaintiffs' continued efforts to persuade court to abstain; attend another hearing re same (9/16/87). Apportion: 20%.

.8 Analyze plaintiffs' most recent positions re dismissal and abstention; draft two responses thereto (filed 10/1/87). Apportion: 20%.

1.7 Review other defendants' papers in support of motions for summary judgment (memoranda and replies); join in same; review plaintiffs' opposition papers; prepare for and attend hearing re same (10/7/87). Apportion: 20%.

13.4 Subtotal: calculation of awardable hours based on work directly reflected in or directly inferable from docketed papers, prior to entry of summary judgment.

Time awardable for hours reasonably spent prior to entry of summary judgment on work not directly reflected in or inferable from docketed papers.

November 1982 through January 1984. Apportion: 50%.

3.0 Conferences/meetings with client; conferences with counsel for other defendants; reviewing documents previously filed (time sheets submitted by counsel for these defendants suggest that something less than seven hours was in fact devoted to matters not directly inferable from docketed papers during this time period; counsel for these defendants did not begin working on the case in any substantial way until December 1983—January 1984).

February 1984 through November 1987. Apportion: 25%.

15.0 Acquiring additional information from and conferring with clients (three of them); updating clients re developments.

5.0 Directing the collection of and analyzing documents.

7.0 Developing strategies; conferring with counsel for other defendants re substantive and tactical matters, including settlement.

2.0 Reviewing documents filed by defendants other than BCPUD (credit has been given in the preceding section for time reasonably spent reviewing documents files by BCPUD).

32.0 Subtotal of apportioned hours for work not directly reflected in or inferable from docketed papers.

Time awardable for "second chair" lawyer.

Because counsel for these defendants did not enter the case until very near the end of the first phase of the litigation (i.e., the period between November of 1982 and January of 1984), time is awardable to Howard, Rice for a "second chair" lawyer only for the second phase (the period between February of 1984, right after dismissal of the antitrust claims and several defendants, and November of 1987, when the court entered summary judgment). Because the conceptual and factual dimensions of the case remained demanding during this period, because Howard, Rice represented three defendants, and because the second phase covered so many months, we conclude that it would be reasonable for a second lawyer to commit 20 essentially duplicative hours to this case in this second phase. Using the 25% apportionment figure applicable to this phase, we recommend that Howard, Rice be credited with an *additional 5.0 hours of attorney time for its "second chair" lawyer.*

5.0 Subtotal of awardable "second chair" attorney time.

Time awardable for pursuit of sanctions.

The "weighted mean" calculation that we use for fixing the figure for apportioning hours for work pursuing sanctions builds, for these three defendants, on the following findings: 6% (3.0 hours) of the time awardable on behalf of LeMieux, Farnsworth, and McClellan through entry of summary judgment was spent at the

50% apportionment rate, 7% (3.3 hours) was spent at the 30% apportionment rate, 67% (34.0 hours) was spent at the 25% apportionment rate, and 20% (10.1 hours) was spent at the 20% apportionment rate. The weighted mean of these figures is 25.9%, which we round down to 25%. Thus, we recommend that the district court apportion awardable hours for the work done on behalf of these defendants in prosecution of the motion for sanctions at the rate of 25%.

Each hourly figure (or fraction thereof) in the left hand column in the section that follows represents 25% of the time that we believe a competent lawyer reasonably would have devoted to the matters separately described.

2.2 Research and draft motion for sanctions and supporting documentation (filed initially 2/16/88).

.5 Analyze PLF's opposition to motion for fees.

.4 Review plaintiffs' opposition to BCPUD's motion for fees (60 pages plus attachments).

.7 Analyze plaintiffs' opposition to motions for fees by defendants other than BCPUD.

2.4 Research and draft reply to opposition to motions for fees (filed 6/1/88).

.4 Prepare for and participate in status conference with special master re motions for sanctions (10/6/88).

.3 Prepare for and participate in second status conference with master (10/27/88).

1.5 Research and draft second memorandum and supporting documentation in support of motion for sanctions (filed 1/9/89).

.4 Review submissions by other defendants in support of motions for sanctions.

1.3 Analyze papers filed (2/13/89) in opposition to motions for sanctions.

.7 Research and draft second reply memorandum re motion for sanctions (filed 3/9/89).

.3 Prepare for and participate in status conference with master re motions for sanctions (3/14/89).

.4 Prepare and gather documents to be included in appendix to fees motion ("appendix" filed 4/3/89).

.4 Analyze PLF's amended opposition to motions for sanctions (filed 4/3/89).

.7 Research and draft brief re first amendment issues (filed 4/27/89).

.3 Review papers filed by other defense counsel in support of motions for fees.

.2 Review recommendations by master and comments thereon (September 1989).

.4 Review master's final recommendations (January 1990).

.4 Prepare for and attend status conference with master (6/21/90).

4.2 Draft memorandum and declaration in support of request for specified amount of fees as sanction (30 pages, including analysis of billing and effects of sanctionable conduct by PLF).

.4 Analyze PLF's opposition to requests for specified amounts of fees (filed 8/17/90).

1.0 Draft reply to PLF's opposition to request for fees (reply and declaration filed 9/4/90).

.3 Gather time records for submission to master and draft declaration re same and correcting typographical errors in 7/23/90 declaration (filed November 5, 1990).

19.8 Subtotal of awardable hours for prosecution of motion for sanctions.

Summary of calculation of hours awardable on behalf of defendants LeMieux, Farnsworth and McClellan:

13.4 Hours for work directly inferable from docketed papers through motion for summary judgment.

32.0 Hours for work not directly reflected in or inferable from docketed papers.

5.0 Hours for "second chair" lawyer.

19.8 Hours for pursuit of sanctions.

70.2 Total hours awardable for attorney time on behalf defendants LeMieux, Farnsworth, and McClellan.

Fixing an appropriate hourly rate for counsel for defendants LeMieux, Farnsworth, and McClellan.

Working from declarations provided by counsel, we estimate that 25% of the time they committed to the defense of this action (through entry of summary judgment) and to pursuit of sanctions was billable at an average of $190 per hour, 8% was billable at $140 per

hour, 20% was billable at an average of $135 per hour, and 47% was billable at an average of $95 per hour. From these figures we calculate the weighted mean billable rate to be about $130 per hour. Thus we recommend that the district court use $130 per hour for all the time awardable to these defendants.

Sanction awardable to counsel for defendants LeMieux, Farnsworth, and McClellan.

On the basis of the figures for awardable hours and for hourly rates set forth in the preceding sections, we recommend that the district court order PLF to pay counsel for these three defendants the sum of *$9,126* (70.2 hours at $130 per hour).

CALCULATING THE TIME AWARDABLE TO DEFENDANT AMOROSO

In the original complaint PLF named Victor Amoroso as a defendant in all of the causes of action, constitutional and antitrust, but when it filed its first amended complaint (August 4, 1983) PLF appeared to drop Amoroso as a defendant from the antitrust claims. We say "appeared" to drop Amoroso from the antitrust claims because PLF did not identify the defendants against whom the thirteenth claim in the amended complaint sounded (this was an alleged conspiracy to monopolize trade in the Bolinas property development and tourist accommodation markets). Amoroso's counsel, however, proceeded on the assumption that Amoroso was not required to respond to any of the antitrust causes of action in the first amended

complaint (see Memorandum of Victor Amoroso in Further Support of Application for Imposition of Sanctions, filed July 25, 1990, at 4).

Amoroso (unlike BCPUD, Kayfetz, LeMieux, Farnsworth and McClellan) was named in only four of the claims that PLF pled in the first amended complaint: the 5th, which sounded vaguely in both substantive and procedural due process, the 6th, which invoked equal protection and substantive due process norms, the 9th, which alleged that the defendants had violated 42 U.S.C. §§ 1981 et seq. by, under color of law, depriving plaintiffs of "rights of free speech, their right to meaningfully petition government, due process of law, just compensation, and equal protection of the laws," and the 11th, which alleged a conspiracy (with specified agencies of government) to deprive plaintiffs of all reasonable uses of their property and to take their property without just compensation. As thus pled (assuming that the conspiracy to monopolize claim did not in fact reach this defendant), the amended complaint pressed claims against Amoroso under what were essentially four different norms: (1) procedural due process, (2) substantive due process, (3) equal protection, and (4) the guarantees against takings without just compensation. Of these claims, only the one sounding in procedural due process is sanctionable. Thus, from August 4, 1983, essentially one-fourth of the case as formally pled against defendant Amoroso was sanctionable.

In addition to pressing the frivolous procedural due process claim, other sanctionable conduct by PLF that caused defendant Amoroso needlessly to incur attorneys' fees expenses included failure to specify which alleged

acts by him supported the claims against him and reversal of position on a key element of the abstention analysis (this defendant does not appear to have been adversely affected by the frivolous portion of PLF's motion to strike (filed April 19, 1983).

In the sections that follow we set forth additional bases for our apportionment of awardable time for Amoroso's defense.

Time awardable on the basis of docketed papers, through entry of summary judgment.

2.0 Efforts to acquire additional time to respond to original complaint, including entering stipulation, drafting declarations on two separate occasions, and preparing an *ex parte* application re same (November 1982 through February 1983). Apportion: 40%.

8.0 Analyze complaint; research and draft motion to dismiss filed 3/31/83. Apportion: 40%.

6.0 Analyze plaintiffs' opposition to motion to dismiss; research and draft reply thereto (filed 5/5/83). Apportion: 40%.

1.6 Prepare for and attend hearing on motion to dismiss (6/22/83). Apportion: 40%.

4.5 Analyze amended complaint; research and draft motion to dismiss those parts of amended complaint that sound against Amoroso (motion filed 10/12/83). Apportion: 35% (at this juncture, one-fourth of the claims pressed against Amoroso were

sanctionable, but about half of the memorandum filed by his counsel in opposition applied to sanctionable matters, including, among other things, the vagueness of the amended complaint).

4.8 Analyze plaintiffs' lengthy opposition to motions to dismiss amended complaint; research and draft reply (filed 11/25/83). Apportion: 35% (while only one-fourth of the claims sounding against this defendant at this juncture were sanctionable, we apportion about 50% of the work reflected in the reply brief to sanctionable conduct).

1.4 Prepare for and attend hearing on second set of motions to dismiss (12/2/83). Apportion: 35% (see two preceding entries).

3.8 Analyze district court's opinion and order ruling on motions to dismiss; draft 25 page answer to surviving portions of the amended complaint that sound against Amoroso (filed 3/20/84). Apportion: 25% (stripped to their essentials, of the four claims that survived and sounded against Amoroso, one [procedural due process] was sanctionable).

1.5 Draft seven identical sets of contention interrogatories, one for each plaintiff (filed 5/7/84). Apportion: 35% (while essentially one-fourth of the claims pending at this point against Amoroso were sanctionable, the plaintiffs' failure to follow Judge Williams' order to plead facts specific to each defendant that allegedly supported each claim exacerbated defense

costs and left counsel for the individual defendants with little choice but to serve interrogatories such as these).

2.0 Analyze first sets of responses by plaintiffs to the contention interrogatories; press for supplemental responses; analyze same (June 1984—June 1985). Apportion: 35%.

.8 Analyze Morganstein's motion to intervene; review and join in opposition thereto filed by BCPUD (joinder filed 10/9/84); attend hearing (10/17/84) re same. Apportion: 25%.

.4 Prepare for and attend status conference (5/15/85). Apportion: 25%.

1.0 Analyze plaintiffs' motion for abstention; review and join response thereto by BCPUD (joinder filed 9/23/85); review plaintiffs' reply; attend hearing (10/2/85) on this motion. Apportion: 25%.

.6 Review additional filings re renewed effort by plaintiffs to persuade court to abstain; attend second hearing re same and simultaneous status conference (3/19/86). Apportion: 25%.

.8 Review additional filings by plaintiffs and other defendants re abstention and plaintiffs' motion to dismiss; attend hearing and status conference re same on 3/4/87. Apportion: 25%.

.6 Review still more papers re abstention; attend yet another hearing re same (9/16/87). Apportion: 25%.

.8 Analyze additional papers filed by plaintiffs in support of motion for abstention and dismissal; draft opposition to motion for abstention (opposition filed 10/2/87). Apportion: 25%.

2.0 Review and join BCPUD's motions for summary judgment and judicial notice; review plaintiffs' filings in opposition; review reply by BCPUD; attend hearing re same (10/7/87). Apportion: 25%.

.3 Oppose plaintiffs' notices of depositions (two telephone hearings, October and November 1987). Apportion: 25%.

42.9 Subtotal: calculation of hours awardable based on reasonably necessary work directly reflected in or inferable from docketed papers, through entry of summary judgment.

Time awardable for hours reasonably spent prior to entry of summary judgment on work not directly reflected in or inferable from docketed papers.

November 1982--January 1984. Apportion: 35% (in choosing this figure we note the following: 40% of the case as pled from November of 1982 through August 4, 1984 was devoted to sanctionable claims; after August 4, 1983, only 25% of the claims to which Amoroso was required to respond were sanctionable; in addition, PLF failed to plead the requisite specificity of facts in the amended complaint).

10.0 Interviewing client and other persons with knowledge; conferences (telephone) and meetings with client re substance and strategy; updating client re procedural

developments (given the fact that counsel for Amoroso had only one client and that after August 4, 1983, he was not named in some of the most difficult and troublesome claims, the number of hours counsel reasonably could commit to his defense is smaller than the hours counsel for the parties previously treated in this report and recommendation could reasonably commit).

12.0 Directing the collection of and analyzing documents.

6.0 Exploring alternative strategies; conferring with counsel for other defendants re substantive, procedural, and tactical matters; coordinating work among defense counsel.

5.0 Analyzing papers filed by other defendants.

February 1984—November 1987. Apportion: 25%.

6.0 Acquiring additional information from and conferring with client; updating client re developments.

2.0 Directing the collection of and analyzing additional documents.

5.0 Developing strategies; conferring with counsel for other defendants; coordinating defense effort and settlement posture.

2.0 Reviewing papers filed by defendants (other than those in which Amoroso formally joined, as reflected in docketed papers; credit for time reviewing papers in the latter category was given in preceding section).

48.0 Subtotal of apportioned hours for work not directly reflected in or inferable from docketed papers.

Time awardable for "second chair" lawyer.

Because the case against defendant Amoroso became less complex with the filing of the amended complaint (8/4/83), compared with several of the other fee-petitioning defendants, there is less justification for essentially duplicative attorney time in his defense. During the first nine months of the litigation it would have been reasonable for a second lawyer to commit 10 hours to duplicative work (in order to be prepared to pinch hit in emergencies, supplement the lead lawyer's resources to meet deadlines, etc.). We believe that only an additional 12 hours of such attorney time could be justified during the second period (between August 1983 and November 1987), even though it was much longer, because the case was less complex (as against Amoroso), the conceptual center of the case remained constant, relatively little discovery was completed, and the lead defense oars were being pulled by counsel for other parties. Applying a 35% apportionment rate to the first period and a 25% rate to the second, we recommend that counsel for Amoroso be awarded an additional 6.5 hours for time committed by a "second chair" lawyer.

6.5 Subtotal of awardable "second chair" attorney time.

Time awardable for pursuit of sanctions.

The weighted mean calculation that we use to fix the figure for apportioning hours for work reasonably spent pursuing sanctions on behalf of defendant Amoroso

builds on the following findings: 18% (17.6 hours) of the awardable time was spent at the 40% apportionment figure, 52% (50.7 hours) was spent at the 35% apportionment rate, and 30% (29.1 hours) was spent at the 25% apportionment rate. The weighted mean of these figures is 38.3%, which we round down to 35%. Thus, each hourly figure, or fraction thereof, in the left column in the section that follows represents 35% of the time that we believe a competent lawyer reasonably would have devoted to the matters separately described. In fixing these hours we consider, among other things, the character and complexity of the proceedings against defendant Amoroso as well as the papers actually filed on his behalf.

3.0 Research and draft initial memorandum and declaration in support of motion for fees (filed 2/17/88).

2.5 Analyze papers filed by PLF and by plaintiffs in opposition to motions for fees as applicable to defendants other than BCPUD; review opposition to motion by BCPUD.

2.0 Draft reply (filed 6/7/88) to plaintiffs' opposition to motions for fees.

.8 Prepare for and attend status conferences with master re sanctions proceedings (10/6/88 and 10/27/88).

2.5 Research and draft revised motion for sanctions and declaration in support thereof (filed 1/6/89).

1.5 Analyze papers (memoranda, declarations, exhibits) filed by plaintiffs in opposition to

revised motions for sanctions (February 1989).

.4 Prepare for and attend status conference with master (3/14/89).

2.5 Analyze extensive papers filed by plaintiffs in further opposition to motions for sanctions (amended opposition filed 4/3/89).

1.2 Review papers filed in reply to plaintiffs' opposition to motions for sanctions; draft reply on behalf of Amoroso to same (reply filed 4/26/89).

1.5 Review master's draft recommendations (filed 9/8/89) and PLF's and BCPUD's comments on same.

1.1 Review master's final report and recommendations re liability aspects of motions for sanctions (filed January 11, 1990); review PLF's objections to same.

.3 Participate in status conference with master re second phase (re nature and amount) of sanctions proceedings (6/21/90).

1.3 Draft memorandum and declaration in support of requested fee award (filed 7/25/90).

.5 Analyze PLF's opposition to requests for fees.

.4 Compile billing/time records for submission in response to master's order of October 25, 1990 (records filed November 5, 1990).

21.5 Subtotal of awardable hours for prosecution of motion for sanctions.

Summary of calculation of awardable attorney hours:

42.9 Hours for work directly inferable from docketed papers, through entry of summary judgment.

48.0 Hours for work not directly reflected in or inferable from docketed papers.

6.5 Hours for "second chair" lawyer.

21.5 Hours for pursuit of sanctions.

118.9 Total awardable hours.

Fixing an appropriate hourly rate for counsel for Amoroso.

From the declarations and time/billing records submitted on behalf of defendant Amoroso, we find that 82% (97.4 hours) of the awardable time devoted to Amoroso's defense was billable at a rate of $80 per hour, 7% (8.3 hours) was billable at a rate of $100 per hour, and 11% (13.2 hours) was billable at $120 per hour. The weighted mean of these figures is $85.80. Rounding down, we find that in fixing the award on behalf of this defendant, it is appropriate to use an *hourly rate of $85.*

Sanction awardable on behalf of defendant Amoroso.

Based on the findings made in the preceding sections for awardable hours and for an appropriate hourly rate, we recommend that the district court order PLF to pay by way of sanction the sum of *$10,106.50* (118.9 hours x $85.00 per hour) to the account of defendant Amoroso.

CALCULATING THE AWARD FOR DEFENDANTS' NIMAN AND SCHELL

PLF made William Niman a defendant in each of the claims in the original complaint. PLF first made Orville Schell a defendant when it filed the first amended complaint (August 4, 1983). In that pleading, PLF made Niman and Schell defendants in four separate claims for relief (significantly, they were not named as defendants in the antitrust claims). Through the allegations in the 5th, 6th, 9th and 11th claims, Niman and Schell were called upon to respond to claims predicated on procedural due process, substantive due process, equal protection, conspiracy to cause a taking without just compensation, and conspiracy to violate rights protected by the civil rights statutes at 42 U.S.C. §§ 1981 et seq. (the rights that allegedly were the targets of this latter conspiracy included those protected by both the substantive and procedural dimensions of the due process clause, the first amendment, the fifth and 14th amendments' guarantees of just compensation for a taking, and the equal protection clause). It is arguable that Niman and Schell also were defendants in the 13th claim as PLF presented it (an alleged conspiracy to monopolize the property development and tourist accommodation markets in Bolinas in violation of antitrust laws), because PLF failed to identify in that claim who it sounded against and incorporated by reference into this claim all of the other paragraphs in the amended complaint except those whose sole function was to effect another incorporation by reference.

For the period between November of 1982, when the original complaint was filed, and August of 1983, when it

was superseded by the amended complaint, approximately 40% of the claims pled against Niman and the other original defendants were sanctionable (procedural due process and antitrust).

During the period between August of 1983, when the amended complaint was filed, and November of 1987, when summary judgment was entered, PLF sought relief against Niman and Schell under essentially four separate norms (procedural due process, substantive due process, equal protection, and the prohibition against takings without just compensation). The district court has concluded that bad faith attaches to pursuit of claims under only one of these four norms (procedural due process). Thus, from August 4, 1983, essentially one-fourth of the case as formally pled against Niman and Schell was sanctionable.

As noted several times in the preceding pages, PLF's bad faith failure to plead a fact-specific nexus between each defendant and each claim for relief, as well as its bad faith reversal of position on a key component of abstention analysis, also caused counsel representing Niman and Schell needlessly to expend time in defense of this action. We have taken all of these considerations into account when fixing the apportionment figures in the sections that follow.

Time awardable to the defense of Niman and Schell on the basis of docketed papers, through entry of summary judgment.

.5 Negotiate extensions of time to respond to original complaint (late 1982—early 1983). Apportion: 40%.

12.0 Analyze complaint; research and draft motion to dismiss (filed 4/1/83). Apportion: 40%.

2.0 Analyze plaintiffs' opposition to motions to dismiss; research and draft reply (filed 5/4/83). Apportion: 40%.

1.6 Prepare for and attend hearing on motions to dismiss (6/22/83). Apportion: 40%.

5.0 Analyze lengthy amended complaint (which adds Schell as a defendant for first time); research and draft second motion to dismiss (filed 10/11/83). Apportion: 35% (while PLF is being sanctioned for pursuing only one of the four norms it pressed in the amended complaint against these defendants, about half of the motion to dismiss was devoted to sanctionable matters, including the failure to plead with the specificity required by Judge Williams' order granting motions for more definite statements).

1.6 Analyze plaintiffs' lengthy opposition to second wave of motions to dismiss; prepare for and attend hearing on motions to dismiss amended complaint (hearing: 12/2/83). Apportion: 25%.

2.3 Review court's opinion and order responding to second wave of motions to dismiss; draft answer to remaining portions of amended complaint that apply to Niman and Schell (answer filed 3/16/84). Apportion: 25%.

2.0 Draft seven identical sets of contention interrogatories on behalf of Niman (one to each plaintiff) and seven others on behalf

of Schell (filed 5/11/84). Apportion: 35% (while pursuit of only one of the four norms invoked by PLF at this time against these defendants was sanctionable, PLF's bad faith failure to follow Judge Williams' order to plead facts specific to each defendant that allegedly supported each claim made it necessary for these defendants to use contention interrogatories to seek this information).

3.5 Analyze plaintiffs' first set of responses to interrogatories on behalf of these two defendants; press for supplemental responses; analyze supplemental responses (June 1984 - June 1985). Apportion: 35%.

.3 Review papers filed and orders entered re Morganstein's motion to intervene (counsel for these defendants filed no papers re that motion and did not attend the hearing on it, which took place on 10/17/84). Apportion: 25%.

.4 Prepare for and attend status conference of 5/15/85. Apportion: 25%.

1.0 Review papers filed by other parties re plaintiffs' first motion for abstention; join BCPUD's opposition thereto; attend hearing re same (10/2/85). Apportion: 25%.

.6 Review additional papers re plaintiffs continued efforts to persuade court to abstain; attend second hearing re same (3/19/86). Apportion: 25%.

.8 Review papers re Holter-Mesa Ranch plaintiffs' motion to dismiss and all plaintiffs' renewed motion for abstention;

review and join in responses to same filed by BCPUD; attend hearing re same (3/4/87). Apportion: 25%.

.6 Review still more papers re plaintiffs' abstention motion; attend another hearing re same (9/16/87). Apportion: 25%.

.7 Analyze additional filings by plaintiffs re abstention and dismissals; draft response thereto (filed 10/2/87). Apportion: 25%.

2.0 Review and join BCPUD's motions for summary judgment and requests for judicial notice; review plaintiffs' opposing papers and BCPUD's reply; attend hearing re same (10/7/87). Apportion: 25%.

[No appearances by counsel for these defendants are noted in the minute orders for the telephone hearings in October and November of 1987 on the motions to continue the depositions noticed by plaintiffs, and no time sheets have been submitted from which we could infer that counsel for these defendants participated in these hearings].

36.9 Subtotal: calculation of hours awardable based on reasonably necessary work directly reflected in or inferable from docketed papers, through entry of summary judgment.

Time awardable for hours reasonably spent on behalf of the defense of Niman and Schell prior to entry of summary judgment on work not directly reflected in or inferable from docketed papers.

November 1982—January 1984. Apportion: 35%.

13.0 Interviewing clients (two after 8/4/83) and other persons with knowledge; conferences (telephone) and meetings with

clients re substance and strategy; updating clients re procedural and substantive developments.

14.0 Directing the collection of and analyzing documents.

6.0 Exploring alternative strategies; conferring with counsel for other defendants re substantive, procedural, and tactical matters; coordinating work among defense counsel.

5.0 Analyzing papers filed by other defendants (other than those alluded to in preceding section).

February 1984—November 1987. Apportion: 25%.

9.0 Acquiring additional information from and conferring with clients; updating clients re developments.

3.0 Directing the collection of and analyzing additional documents.

5.0 Developing strategies; conferring with counsel for other defendants; coordinating posture with other defendants re settlement and procedural matters.

2.0 Reviewing papers filed on behalf of other defendants (other than the papers alluded to in the preceding section).

57.0 Subtotal of apportioned hours for work not directly reflected in or inferable from docketed papers.

Time awardable for "second chair" lawyer.

For reasons set forth in the parallel section of this report that covers defendant Amoroso, we conclude that

only a modest number of hours of essentially duplicative attorney time is justifiable on behalf of defendants Niman and Schell. During the first nine months of this litigation, when Niman was compelled to respond to all claims, including those based on antitrust laws, it would have been reasonable for a second lawyer to commit 10 hours of duplicative work to this matter. During the period between August of 1983 and November of 1987, however, only an additional 12 hours of such time is justifiable, as the case as pled against these defendants was less complex, did not evolve much conceptually, and involved only limited discovery. Applying the35% apportionment rate to the first period and the 25% rate to the second, we recommend that an additional 6.5 hours of attorney time be awarded to the defense of Niman and Schell for a "second chair" attorney.

6.5 Subtotal of awardable "second chair" attorney time.

Time awardable for pursuit of sanctions.

The weighted mean calculation by which we determine the apportionment rate that is appropriate for work reasonably committed to prosecution of the motion for sanctions on behalf of these defendants is based upon the following findings: 16% (16.1 hours) of the time awarded in the preceding sections (through entry of summary judgment) was spent at the 40% apportionment rate, 52% (52.0 hours) was spent at the 35% apportionment rate, and 32% (32.3 hours) was spent at the 25% rate. The weighted mean of these figures is 32.6%, which we round down to 30%. Thus each hourly figure, or fraction thereof, in the left column in the section that follows

represents 30% of the time that we believe a competent attorney reasonably would have devoted to the matters separately described.

1.8 Research and draft original motion for sanctions/fees (filed 2/16/88).

2.3 Analyze opposition papers filed separately on behalf of PLF and plaintiffs; read plaintiffs' separate opposition to motion for fees filed by BCPUD.

2.0 Draft reply to papers filed in opposition to motions for fees (reply filed 6/1/88).

.7 Prepare for and attend status conferences with master re motions for sanctions (10/6/88 and 10/27/88).

1.1 Draft second memorandum and declarations in support of motion for fees (filed 1/6/89).

1.3 Analyze oppositions to motions for fees filed by plaintiffs and PLF (2/13/89).

.3 Read and join BCPUD's reply memorandum in support of motions for fees (joinder filed 3/6/89).

.4 Prepare for and participate in status conference with master re motions for sanctions (3/14/89).

2.3 Analyze extensive papers filed by plaintiffs in further opposition to motions for sanctions (April 1989).

.1 Prepare and file "Appendix" in support of motion for fees (filed 4/10/89) (consists of copies of plaintiffs' responses to interrogatories and copy of one letter).

.5 Review papers filed by other defendants in reply to plaintiffs' opposition; draft reply on behalf of Niman and Schell (their reply filed 6/1/89).

1.1 Review master's draft recommendations re liability phase of sanctions proceedings (filed 9/8/89).

.3 Review comments on draft recommendations by other parties.

1.0 Review master's final report and recommendations re liability phase (filed January 11, 1990); review PLF's objections to same.

.3 Participate in status conference (6/21/90) with master re next phase of sanctions proceedings (to determine character and amount of sanctions).

1.5 Draft memorandum and three declarations in support of claim for amount of sanction/fees (filed 7/23/90).

.5 Analyze PLF's opposition to fee requests (opposition filed 8/17/90).

.2 Draft short reply to PLF's opposition to requests for fees (reply filed 8/31/90).

.4 Compile financial/billing documents to respond both to PLF's request for same and to master's order of 10/25/90.

18.1 Subtotal of awardable hours for prosecution of motion for sanctions.

Summary of calculation of awardable attorney hours.

36.9 Hours for work directly reflected in or inferable from docketed papers, through entry of summary judgment.

57.0 Hours for work not directly reflected in or inferable from docketed papers.

6.5 Hours for "second chair" lawyer.

18.1 Hours for pursuit of sanctions.

118.5 Total awardable hours.

Fixing an appropriate hourly rate for counsel for Niman and Schell.

Because much of the work done on this case on behalf of these defendants has been performed by lawyers who are direct employees of their insurance carrier, and because those lawyers were not required, as a matter of their employer's policies, to keep time sheets or billing records in a manner similar to the manner in which such records normally are kept by attorneys in private law firms (outside counsel), it is difficult to determine what rate should attach to the hours here awarded. In the earlier phases of this litigation (1983-1984), it appears that most of the time that was devoted to this case on behalf of these defendants was committed by *outside* lawyers retained specially to work with the carrier's in-house counsel on this matter. At least some of that time was billed at $85 per hour during 1983-1984 (see invoices from William and Capole, attachments to these defendants' submissions of November 2, 1990). The carrier estimates

that the direct cost to it of supporting the time of its in-house counsel on this matter was between $77 and $83 per hour during the years 1987 - 1989, but is unable to fix the figures for the earlier years, except to estimate that they exceeded $50 per hour. See Kealey Declaration of July 18, 1990. Given rates charged by other counsel in the bay area on this case, it certainly would not be unreasonable to fix a rate of $60 per hour for work done between late 1982 and the end of 1986 by the carrier's in-house attorneys. Taking all this data into account, we find that it is appropriate to fix *an average hourly rate for the entire period at the figure of $75 per hour* for the defense of Niman and Schell.

Sanction awardable on behalf of Niman and Schell.

Based on the findings we have made in the preceding sections for awardable hours and for an appropriate hourly rate, we recommend that the district court order PLF to pay by way of sanction the sum of *$8,917.50* (118.9 hours x $75 per hour) to the account of defendants Niman and Schell.

CALCULATING THE TIME AWARDABLE TO DEFENDANT WESTON

PLF named Judith Weston as a defendant in the original complaint; each claim in that pleading, including the antitrust claims, sounded against her (as we have noted above, PLF pled all claims against every named defendant in the original complaint). Despite the fact that she was so named, Ms. Weston proceeded *in pro per* until the end of May, 1983, when her insurance carrier retained the

law offices of Langley and Haigh (then Herrick, Hays, Shaffer & Langley) to defend her in this matter. For reasons set forth elsewhere, we have determined that 40% of the claims covered by the original complaint were sanctionable.

In the amended complaint, filed August 4, 1983, PLF clearly made Weston a defendant against claims sounding in procedural due process, substantive due process, equal protection, and taking without just compensation (the latter being included in actions purportedly arising under 42 U.S.C. §§ 1981 et seq. and under a conspiracy allegation). PLF also arguably made Weston a defendant in one of the antitrust claims (the thirteenth claim for relief; conspiracy to monopolize) by failing to indicate therein which defendants were charged. We have assumed, however, that PLF did not in fact intend to charge Weston in this or any of the other antitrust claims in the amended complaint. Thus, like defendants Amoroso, Niman and Schell, for most of the period prior to entry of summary judgment Weston faced what in essence were four claims, one of which was sanctionable. As with those other defendants, the cost of representing her in this matter also was increased by PLF's bad faith failure to set forth in its amended pleading the specific facts that allegedly supported each claim against her, as well as its bad faith reversal of position on a key element of the abstention analysis.

Time awardable on the basis of docketed papers, through entry of summary judgment.

2.0	Review papers previously filed in case and submit request for substitution of

attorney (May-June 1983). Apportion: 40%.

1.2 Prepare for and attend hearing on motions to dismiss and for more definite statements (6/22/83). Apportion: 40% (recent appearance justifies more preparation time than for some other defense counsel).

1.0 Analyze 59 page amended complaint; research and draft short motion to dismiss amended complaint (motion filed 10/11/83). Apportion: 25% (this motion is couched in very general terms and adds nothing of consequence to papers filed on behalf of other defendants).

.5 Review plaintiffs' opposition to motions to dismiss. Apportion: 25%.

.5 Attend hearing on motions to dismiss (12/2/83). Apportion: 25%.

.1 Draft request for production of documents (filed 2/29/84). Apportion: 25%.

4.0 Analyze Judge Williams' order responding to motions to dismiss amended complaint; draft lengthy answer to the portions of that pleading that remained viable and that sounded against defendant Weston. Apportion: 25%.

3.0 Draft contention interrogatories to plaintiffs; analyze responses thereto filed March 7, 1985 and supplemental declaration in support of answers filed May 15, 1985. Apportion: 35% (PLF's bad faith

failure to set forth in its amended complaint the specific alleged facts that supported each of its claims against Weston made these interrogatories necessary).

.8 Review Morganstein's motion to intervene; review and join in oppositions thereto filed by BCPUD and Kayfetz (joinder in oppositions filed 10/9/84); attend hearing re same (10/17/84). Apportion: 25%.

.4 Prepare for and attend status conference on 5/15/85. Apportion: 25%.

1.6 Analyze plaintiffs' motion for abstention (first filed 8/2/85) and responses filed by BCPUD; join in BCPUD's response (joinder filed 9/20/85); review supplemental submissions by plaintiffs and by BCPUD re same; attend hearings on this motion on 10/2/85 and 3/19/86. Apportion: 25%.

.8 Review papers filed by plaintiffs in support of renewed motion for abstention and for voluntary dismissal of plaintiffs Holter and Mesa Ranch; review responses filed by BCPUD; attend hearing re same on 3/4/87. Apportion: 25%.

1.4 Review additional papers filed by plaintiffs and by BCPUD re motions for abstention and to dismiss; file (10/1/87) "Statement of NonOpposition" to motion to dismiss; attend hearings re these motions on 9/16/87 and 10/2/87. Apportion: 25%.

2.0 Analyze and join in BCPUD's motions for summary judgment and requests for

judicial notice; review opposition papers filed by plaintiffs; review further submissions re same by BCPUD; attend hearing on motions (10/7/87). Apportion: 25%.

.4 Seek protective order to postpone depositions noticed by PLF; participate in telephone hearings re same (October and early November of 1987). Apportion: 25%.

19.7 Subtotal: calculation of awardable hours based on reasonably necessary work directly reflected in or inferable from docketed papers, through entry of summary judgment.

Time awardable for hours reasonably spent prior to entry of summary judgment on work not directly reflected in or inferable from docketed papers.

May 1983 (when counsel first appeared on behalf of Weston--January 1984. Apportion: 35%.

5.0 Interviewing client and other persons with knowledge; conferences (telephone) and meetings with client re substance, procedure and strategy; updating client re developments.

6.0 Directing the collection of and analyzing documents.

5.0 Exploring alternative strategies; conferring with counsel for other defendants re substantive, procedural, and tactical matters; coordinating work among defense counsel.

3.0 Analyzing papers filed by defendants other than BCPUD.

February 1984—November 1987. Apportion: 25%.

6.0 Acquiring additional information from and conferring with client; updating client re developments.

2.0 Directing the collection of and analyzing additional documents.

5.0 Developing strategies; conferring with counsel for other defendants; coordinating defense effort and settlement posture.

2.0 Reviewing papers filed by defendants other than BCPUD.

34.0 Subtotal of apportioned hours for work not directly reflected in or inferable from docketed papers.

Time awardable for "second chair" lawyer.

During the ten weeks between late May of 1983, when counsel for Weston first became involved in this case, and August 4, 1983, when PLF amended the complaint and in effect dropped the antitrust claims against defendant Weston, it is not clear that it would have been reasonable for a second lawyer to have committed any appreciable amount of duplicative time to this matter. For reasons set forth in parallel sections devoted to other defendants, however, we conclude that it would have been reasonable for a second lawyer to commit 12 hours of duplicative time to this case during the period between August 1983 and November 1987. Applying the 25% apportionment rate to this 12 hour total yields 3.0 awardable hours for "second chair" attorney time.

3.0 Subtotal of awardable time for "second chair" attorney.

Time awardable for pursuit of sanctions.

The weighted mean calculation by which we determine the apportionment rate that is appropriate for work reasonably committed to prosecution of the motion for sanctions on behalf of defendant Weston is based upon the following findings: 6% (3.2 hours) of the awardable time through entry of summary judgment was spent at the 40% apportionment rate, 39% (22.0 hours) was spent at the 35% rate, and 55% (31.5 hours) was spent at the 25% rate. The weighted mean of these figures is 29.8%, which we round off to 30%. Thus each hourly figure, or fraction thereof, in the left column in the section that follows represents *30%* of the time that we believe a competent attorney would have devoted to the matters separately described.

1.3	Analyze and join BCPUD's memorandum in support of motion for fees; draft separate motion for attorneys' fees on behalf of Weston and supporting declaration (filed 2/16/88).
2.3	Analyze papers filed separately by plaintiffs' and by PLF in opposition to motions for fees; read plaintiffs' opposition to motion for fees by BCPUD.
.4	Review papers filed by other defendants, primarily BCPUD, in reply to plaintiffs' opposition to motions for fees.
.7	Prepare for and attend status conferences with special master re motions for sanctions (10/6/88 and 10/27/88).

.7 Draft renewed application for fees, memorandum and declaration in support thereof (filed 1//6/89; amended notice filed 1/12/89).

1.3 Analyze papers filed by plaintiffs' in February, 1989, in opposition to motions for fees.

.5 Review and join BCPUD's reply to plaintiffs' opposition to motions for fees; draft reply on behalf of Weston (latter filed 3/6/89).

.4 Prepare for and attend status conference with master (3/14/89).

.1 Prepare appendix to motion for sanctions (filed 4/3/89).

2.3 Analyze voluminous papers filed by plaintiffs in further opposition to motions for sanctions (filed in April 1989).

.5 Review papers filed by BCPUD in reply to supplemental filings by plaintiffs; draft joinder in same and a separate, supplemental reply on behalf of defendant Weston (latter filed 4/20/89).

1.4 Review master's draft recommendations re liability phase of sanctions proceedings (draft filed 9/8/89); review comments thereon by other parties.

1.0 Review master's final report and recommendations reliability phase of sanctions proceedings (filed January 11, 1990); review PLF's objections to final report and recommendations.

.3 Participate in status conference with master on June 21, 1990, to determine how to proceed with second phase of sanctions proceedings (devoted to fixing character and magnitude of sanctions).

2.0 Draft memorandum and declaration supporting request for specified amount of fees by way of sanctions (filed 7/23/90).

.5 Analyze PLF's opposition to requests for specified fees (opposition filed 8/17/90).

.4 Prepare time sheets/billing records for filing with master (filed under seal November 5, 1990).

16.1 Subtotal of awardable hours for prosecution of motion for sanctions.

Summary of calculation of awardable attorney hours.

19.7 Hours for work directly reflected in or inferable from docketed papers, through entry of summary judgment.

34.0 Hours for work not directly reflected in or inferable from docketed papers.

3.0 Hours for "second chair" lawyer.

16.1 Hours for pursuit of sanctions.

72.8 Total awardable hours.

Fixing an appropriate hourly rate for counsel for defendant Weston.

Fixing an appropriate hourly rate for counsel for Weston is complicated by some apparent inconsistencies,

to put it mildly, in figures presented to the court at different times by counsel in this connection. In a memorandum entitled "Defendant Judith Weston's Application for Attorney's Fees," filed February 16, 1988, counsel claimed some $21,908 in fees, based on hourly rates ranging between $75 per hour on the low end and $150 per hour on the high end. Of the 197.5 hours claimed in this memorandum, counsel indicated that the billing rate for all but about 20 hours was between $100 per hour and $150 per hour. Thus the average and the weighted mean figures for the hours so claimed clearly exceeded $100 per hour. Inexplicably (by the undersigned, at least), about a year later (January 6, 1989), the same law offices submitted a "Declaration of Pamela Mills Casey in Support of Application for Award of Attorneys' Fees" in which counsel asserted that the "hourly charge for work performed in this matter averages approximately Eighty-Five Dollars ($85) per hour." Moreover, even though the number of claimed attorney *hours increased* from 197.5 in February of 1988 to 262 in January of 1989, the total amount of compensation for the *attorneys' fees* component of the *claim* on behalf of defendant Weston *decreased* from $21,908 in February of 1988 to $19,765 in January of 1989. We also feel constrained to point out that while we do not purport to understand every form of entry in the time sheets/billing records submitted by counsel for Weston, we have not found in them any evidence that the actual historical billing rate by any lawyer who worked on her defense in this case reached even $100 per hour at any time prior to the entry of summary judgment (November 1987). Given the data from these lawyers that we can

comprehend, and factoring in (negatively) the inconsistencies and infirmities in the claims for attorneys' fees presented by them, we conclude that the appropriate hourly rate for calculating the sanctions award on behalf of Ms. Weston's defense is *$80 per hour.*

Sanction awardable on behalf of defendant Weston.

Based on the findings we have made in the preceding sections for awardable hours and for an appropriate hourly rate, we recommend that the district court order PLF to pay, by way of sanction, the sum of *$5,824* (72.8 hours x $80.00 per hour) for expenses needlessly incurred in defense of Ms. Weston.

CALCULATING THE AWARD ON BEHALF OF DEFENDANT MARGUERITE HARRIS

PLF did not name Ms. Harris as a defendant in the original complaint. Rather, Ms. Harris was first made a defendant when PLF filed the amended complaint on August 4, 1983. Counsel for Ms. Harris opened a file on her behalf on August 16, 1983, and began billing time to this matter on August 18, 1983. Thus, we begin calculating the award that we recommend for Ms. Harris from that date.

Like defendants Amoroso, Niman, Schell, and Weston, Ms. Harris was named as a defendant in four of the claims that PLF presented in the amended complaint. For the reasons we set forth in the parallel sections of this report that relate to those defendants, we conclude that essentially one-fourth of the case as formally pled against Ms. Harris involved sanctionable allegations.

Additional sanctionable conduct by PLF that adversely affected the efficiency of Ms. Harris' defense included the willful failure to specify in the amended complaint which alleged acts by Ms. Harris supported each claim against her and the bad faith reversal of position with respect to a key component of abstention analysis.

Time awardable for the defense of Ms. Harris on the basis of docketed papers, through entry of summary judgment.

5.0 Analyze 59 page amended complaint; review motions and orders previously filed; research and draft motion to dismiss on behalf of Harris (filed 10/12/83). Apportion: 35% (while 25% of the claims pending at this juncture against Harris were sanctionable, PLF's bad faith failure to specify in its amended complaint which specific acts supported each claim against Ms. Harris increased the cost of analyzing and responding to this pleading).

4.2 Analyze lengthy memorandum filed by plaintiffs in opposition to renewed motions to dismiss; research and draft reply on behalf of Harris (reply filed 11/25/83). Apportion: 35% (see explanation in preceding entry).

1.4 Prepare for and attend hearing on motions to dismiss amended complaint (12/2/83). Apportion: 35%.

3.5 Analyze district court's opinion and order in response to motions to dismiss amended complaint; draft lengthy

answer to that pleading (answer filed 3/15/84). Apportion: 25%.

2.1 Draft one set of contention interrogatories to all plaintiffs (filed 5/17/84); review first set of "answers"; pursue supplemental answers and certification; analyze supplemental answers (received late 1984; filed 3/7/85). Apportion: 35% (while only 25% of the claims pending against Harris at this time were sanctionable, PLF's failure to comply with Judge Williams' order requiring fact-specific pleading as to each defendant made resort to these contention interrogatories necessary).

1.1 Analyze Morganstein's motion to intervene; review and join opposition filed by BCPUD; draft additional memorandum in opposition to same (filed with joinder 10/3/84); prepare for and attend hearing re same (10/17/84). Apportion: 25%.

.4 Prepare for and attend status conference on 5/15/85. Apportion: 25%.

1.0 Analyze plaintiffs' motion for abstention; review and join BCPUD's response thereto (joinder filed 9/16/85); review plaintiffs' reply; prepare for and attend hearing (10/2/85) re this motion. Apportion: 25%.

.6 Review additional papers filed by plaintiffs in further attempt to persuade district court to abstain; prepare for and attend second hearing on this issue (3/19/86). Apportion: 25%.

.8 Review yet another set of filings by plaintiffs in support of motion to intervene, including second supplement memorandum re same; review papers filed in support of motions to dismiss by plaintiffs Holter and Mesa Ranch; attend hearing and status conference re both motions on 3/4/87. Apportion: 25%.

.6 Review additional papers filed by plaintiffs and by BCPUD re abstention issue; join BCPUD's opposition to plaintiffs' motion for abstention (joinder filed 9/10/87); attend hearing re same (9/16/87). Apportion: 25%.

.8 Review renewed and modified motion for abstention and renewed motions to dismiss on behalf of certain plaintiffs; draft response thereto (filed 10/1/87). Apportion: 25%.

2.0 Review and join BCPUD's motions for summary judgment and judicial notice; review papers filed by plaintiffs and by BCPUD re evidentiary matters; review papers filed by plaintiffs in opposition to motions for summary judgment and replies by BCPUD; attend hearing re same (10/7/87). Apportion: 25%.

.3 Oppose plaintiffs' notices of depositions; participate in two telephone conferences with magistrate re same (October and November of 1987). Apportion: 25%.

23.8 Subtotal: calculation of hours awardable based on reasonably necessary work directly reflected in or inferable from docketed papers, through entry of summary judgment.

Time awardable for hours reasonably spent prior to entry of summary judgment on work not directly reflected in or inferable from docketed papers.

August 1983—January 1984. Apportion: 35%.

3.5 Interviewing client and other persons with knowledge; conference (telephone) and meetings with client re substance and strategy; updating client on procedural and other developments.

4.5 Directing the collection of and analyzing documents.

3.5 Exploring alternative strategies; conferring with counsel for other defendants re substantive, procedural and tactical matters; coordinating work among defense counsel.

2.5 Analyzing papers by defendants other than BCPUD.

February 1984—November 1987. Apportion: 25%.

6.0 Acquiring additional information from and conferring with client; updating client re developments.

2.0 Directing the collection of and analyzing additional documents.

5.0 Developing strategies; conferring with counsel for other defendants; coordinating defense effort and settlement posture.

2.0 Reviewing papers filed by defendants other than BCPUD.

29.0 Subtotal of apportioned hours for work not directly reflected in or inferable from docketed papers.

Time awardable for "second chair" lawyer.

For reasons explained in parallel sections related to other individual defendants, we find that it would have been reasonable for a second lawyer to commit 12 hours of essentially duplicative time to this case during the period between August 1983, when Ms. Harris was first brought into this matter, and November of 1987, when the district court entered summary judgment. Applying a 25% apportionment rate to this 12 hour total yields *3.0 awardable hours* for "second chair" attorney time.

3.0 Subtotal of awardable time for "second chair" lawyer.

Time awardable for pursuit of sanctions.

The weighted mean calculation by which we determine the apportionment rate that is appropriate for work reasonably committed to prosecution of the motion for sanctions on behalf of defendant Harris is based on the following findings: 48% (26.7 hours) of the awardable time through entry of summary judgment was spent at the 35% apportionment rate and, during that same period, 52% (29.1 hours) of the awardable time was spent at the 25% rate. The weighted mean of these figures is 29.8%, which we round off to 30%. Thus, each hourly figure, or fraction thereof, in the left hand column in the

section that follows represents *30%* of the time that we believe a competent attorney would have devoted to the matters separately described.

1.5 Draft motion for fees and costs (filed 2/16/88); review and join BCPUD's motion for fees.

2.3 Analyze papers filed separately by plaintiffs and by PLF in opposition to motions for fees; read plaintiffs' lengthy separate opposition to motion for fees filed by BCPUD.

2.5 Review papers filed by other defendants in reply to plaintiffs' and PLF's opposition to motion for fees; draft joinder in BCPUD's reply and a separate memorandum in reply on behalf of defendant Harris (this separate memorandum, filed 6/1/88, reflects a detailed analysis of evidentiary submissions made by plaintiffs in connection with their opposition and of their answers to interrogatories).

.7 Prepare for and attend status conferences with master re motions for sanctions (10/6/88 and 10/27/88).

1.2 Draft second memorandum in support of motion for fees (filed January 6, 1989).

1.3 Review papers filed by plaintiffs in opposition to motions for fees (February 1989).

.4 Prepare for and participate in status conference with master re motions for sanctions (3/14/89).

.3 Prepare Appendix to request for sanctions on behalf of defendant Harris.

.5 Review plaintiffs' amended opposition to motions for fees, accompanied by voluminous exhibits (filed April 1989) (this apportioned figure is based on hours actually billed, not on the master's estimate of the time that counsel could have justified for this work; if the figure were based on the latter, it would be higher).

.2 Review reply papers filed by other defendants (BCPUD, Amoroso, and Weston).

.4 Review master's draft recommendations re liability phase of sanctions proceedings (filed 9/8/89; again, the figure allotted for this work is based on time records submitted by defense counsel and not on the master's independent judgment about how much time could be justified for this work; the latter would be higher).

.3 Review comments by BCPUD and by PLF on master's draft recommendations.

.6 Review master's final report and recommendations re liability phase of sanctions proceedings and PLF's objections to same (January 1990).

.3 Participate in status conference with master re second phase of sanctions proceedings (to determine character and amount of sanctions; 6/21/90).

1.5 Draft memorandum and declaration in further support of request for specified

amount of fees by way of sanction (filed July 23, 1990).

.2 Prepare time sheets and billing records for submission to master in response to his order of October 25, 1990 (records filed on behalf of defendant Harris 11/5/90).

14.2 Subtotal of awardable hours for prosecution of motion, for sanctions on behalf of defendant Harris.

Summary of calculation of awardable attorney hours on behalf of defendant Harris.

23.8 Hours for work directly reflected in or inferable from docketed papers, through entry of summary judgment.

29.0 Hours for work not directly reflected in or inferable from docketed papers.

3.0 Hours for "second chair" lawyer.

14.2 Hours for pursuit of sanctions.

70.0 Total awardable hours.

Fixing an appropriate hourly rate for counsel for defendant Harris.

In the Declaration of M. N. White in Support of Motion of Defendant Harris for Fees and Costs, filed February 16, 1988, counsel state that their "hourly rate for work performed on Ms. Harris' behalf was $75 until December 1, 1987, at which time the hourly rate was increased to $90." Thus, the rate for the awardable time committed prior to entry of summary judgment should be

$75 per hour. The rate for awardable time committed to prosecution of the motion for sanctions was $90, which is the figure we accept for calculating that portion of the award on behalf of Ms. Harris.

Sanction awardable on behalf of defendant Harris.

We have awarded 55.8 hours to the defense of Ms. Harris prior to entry of summary judgment. At an hourly rate of $75 we recommend an award on her behalf for that period of $4,185.00. For the prosecution of the motion for sanctions, we have awarded 14.2 hours of attorney time. At an hourly rate of $90, we recommend an additional award on behalf of Ms. Harris in the amount of $1,278.00. The sum of these two figures is *$5,463.00*, which we recommend the district court order PLF to pay, by way of sanction, for expenses needlessly incurred on behalf of this defendant.

SUMMARY OF RECOMMENDED AWARDS AND CALCULATION OF TOTAL AMOUNT OF SANCTION.

For the reasons set forth in detail above, the master HEREBY RECOMMENDS that the district court order PLF to pay, by way of sanction for litigation expenses its bad faith conduct needlessly caused defendants to incur, the following sums:

$77,070.00	For expenses incurred on behalf of defendant BCPUD.
$19,927.50	For expenses incurred on behalf of defendant Kayfetz.

$9,126.00	For expenses incurred on behalf of defendants LeMieux, Farnsworth, and McClellan.
$10,106.50	For expenses incurred on behalf of defendant Amoroso.
$8,917.50	For expenses incurred on behalf of defendants Niman 1 and Schell.
$5,824.00	For expenses incurred on behalf of defendant Weston.
$5,463.00	For expenses incurred on behalf of defendant Harris.
$136,434.50	**Total sanction recommended.**

Date: January 28, 1991.

/s/ Wayne D. Brazil
Wayne D. Brazil
Special Master
Magistrate Judge

APPENDIX F

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, et al., Plaintiffs v. PAUL KAYFETZ, et al., Defendants.	C-82-6191-SW ORDER ADOPTING RECOMMENDATION OF MAGISTRATE OCTOBER 22, 1990 (Filed Oct. 24, 1990)

I concur with the recommendation of the U.S. Magistrate filed in this case on October 22, 1990 and hereby adopt the recommendation that all sanctions proceedings against individual attorneys be terminated immediately and permanently. However, I also agree with the U.S. Magistrate that the sanctions proceedings against the Pacific Legal Foundation continue.

However, nothing in this order should be construed as a criticism of the U.S. Magistrate in the handling of the sanctions hearings. I commend the U.S. Magistrate for the thorough and fair assessment of the sanctions issues.

I do agree that at this juncture, the continuation of the sanctions hearings against individual attorneys may harm individual attorneys not at fault, and the expenditure of time and effort to further adjudicate these issues is not outweighed by any benefit that might accrue from the continued adjudication. But the past process of these sanctions proceedings may have given counsel an opportunity to reflect upon their conduct in this case and

highlighted improper behavior, even if it has not resulted in the imposition of sanctions, and may be helpful to counsel in their future practice. For these reasons, I agree that the sanctions proceedings against the individual attorneys should be immediately terminated.

Therefore, the sanctions proceedings against individual attorneys in this case is HEREBY TERMINATED. The sanctions proceedings against the Pacific Legal Foundation, though, are not terminated.

IT IS SO ORDERED.

DATED: 24 Oct 1990 /s/ Spencer Williams
UNITED STATES
DISTRICT COURT JUDGE

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APPENDIX G

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, et al.,

Plaintiffs,

v.

PAUL KAYFETZ, et al.,

Defendants.

NO. C 82 6191 SW/WDB

RECOMMENDATION OF SPECIAL MASTER RE TERMINATING SANCTIONS PROCEEDINGS AGAINST INDIVIDUAL ATTORNEYS

(Filed Oct. 22, 1990)

_____/

Pursuant to a schedule worked out in late June, 1990, the five individual attorneys (Darlene Ruiz, Ronald Zumbrun, Harold Hughes, Robert Best, and Orrin Finch) named in the Report and Recommendations of Special Master re Liability Aspects of Defendants' Motions for Sanctions fiied lengthy briefs (accompanied by declarations and other attachments) on July 23, 1990. Defendants filed their responsive memoranda on August 17, 1990. The individual attorneys then filed their reply briefs, again with attachments, on August 30 and 31, 1990. The master has considered all these submissions, and has reviewed materials filed earlier in this matter. After considerable deliberation, including a careful re-examination of the Report and Recommendations filed on January 11,

1990, the master HEREBY RECOMMENDS that the sanctions proceedings against the individual attorneys be terminated immediately and permanently.

The reason for this recommendation is the master's concern that, given the procedural posture of this matter, especially the conclusions already articulated by the undersigned and adopted by the District Court, it would be impossible to adjudicate the sanctions issues as to these individual attorneys in a way that would maintain the appearance of fairness to which the individual attorneys are entitled. Without addressing the several other arguments advanced in favor of this conclusion by the individual attorneys, the master is persuaded that the way he has articulated certain key findings in his report[1] creates an irreversible impression that he has in fact reached final conclusions as to the culpability of individual attorneys with respect to certain pleadings or other papers.

While most or all of the individual attorneys have been on clear notice for many years that their conduct in this matter would be the subject of scrutiny in sanctions proceedings,[2] none of the individual attorneys was formally a target of the sanctions proceedings prior to the

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[1] See, e.g., the following passages in the master's Report and Recommendations, filed January 11, 1990: p. 4, line 18 through p. 5, line 1; p. 9, line 26 through p. 10, line 17; p. 46, lines 1-3; p. 57, line 18 through p. 59, line 3; p. 74, line 21 through p. 75, line 3; p. 75 line 16 through p. 77, line 6; p. 84, lines 15-25; p. 86, lines 10-20; p. 90, lines 6-22; p. 91, lines 14-19; p. 98, lines 4-10; p. 99, lines 13-17; p. 100, line 19 through p. 101, line 10.

[2] See, e.g., BCPUD's Answer and Judge Williams' Order and Memorandum of July 5, 1983.

time the master filed his findings, none of these attorneys was separately represented in those proceedings, none was asked or ordered to present information explaining what role he or she played, what research or inquiry he or she actually made, what reasoning process he or she used, or what mitigating circumstances might have attended his or her conduct.

When he recommended that the District Court order him to hold hearings to determine whether it would be appropriate to sanction any or all of the individual attorneys, the master felt that he could approach these matters with an open mind, that he would consider the information and explanations offered by the attorneys fairly, and that there was a real possibility that he would decide that it would be inappropriate to sanction any of the individual attorneys (e.g., because, despite appearances, none of the individuals was truly responsible for the content of the papers in question, or because they could present new explanations for certain positions). The master still believes that he could proceed in this matter with an open, persuadable mind. But he acknowledges that the ways he has articulated some of his key findings invites an inference that his mind has been closed and could not be re-opened. A person reading the record might well infer that, as a result of proceedings already had and in which the individual attorneys were formally not parties, the burden of persuasion has shifted from the moving parties to the individual attorneys who, at this juncture, appear to be faced with the formidable task of trying to dislodge firmly held views that were formed without direct input from them in their individual capacities. Because the master cannot identify steps that could be

taken that would eliminate the appearance of unfairness that the record would create, he recommends that the District Court order the immediate and permanent termination of the sanctions proceedings against the individual attorneys. The sanctions proceedings against the Pacific Legal Foundation should go forward.

IT IS SO RECOMMENDED.

DATED: October 22, 1990

/s/ Wayne D. Brazil
Wayne D. Brazil
United States Magistrate

APPENDIX H

Matthew LOCKARY; Susan Irland Lockary; Charles Gilbert; Phyllis Gilbert; James Macey; Anton Holter; Mesa Ranch, Inc., Plaintiffs-Appellants,

v.

Paul KAYFETZ; Victor Amoroso; Mary Lowry; Diana Lopez Farnsworth; Frederick B. McClellan; Peter Warshall; David L. Van Dusen; Doris Elaine Lemieux; Jack Bowen McClellan; William Niman; Judith Weston, as individuals; Bolinas Community Public Utility District, an incorporated public utility district; Bolinas Planning Council, a nonprofit corporation; John Goodchild; Gregory C. Hewlett; Steve Matson; Patricia L. Smith; Ray Moritz; Robert J. Scarola; Diane Middleton McQuaid; Frederick G. Styles, as individuals; Marin County Planning Department, Defendants-Appellees.

No. 87-15044

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 10, 1990.

Decided July 18, 1990.

As Amended on Denial of
Rehearing Oct. 30, 1990.

Richard M. Stephens and Orrin P. Finch, Pacific Legal Foundation, Sacramento, Cal., for plaintiffs-appellants.

R.S. Cathcart, Bledsoe, Cathcart, Leahy, Starr & Diestel, San Francisco, Cal., for defendant-appellee, Paul Kayfetz.

Richard E.V. Harris, Orrick, Herrington & Sutcliffe, San Francisco, Cal., for defendant-appellee, Bolinas Community Public Utility Dist.

Randall A. Padgett, Ginder, Belkin Foster & Doyle, Berkley, Cal., for defendant-appellee, William Niman.

Appeal from the United States District Court for the Northern District of California.

Before WIGGINS, THOMPSON and TROTT, Circuit Judges.

WIGGINS, Circuit Judge:

Appellants, individuals, a partnership, and its general partners, are current and former owners of undeveloped land who contest the grant of summary judgment to appellees, a public utility district and its directors. On appeal, the individual appellants assert that appellees' refusal to grant water hookups to them constitutes a regulatory taking of their land and violates their constitutional rights to substantive due process and equal protection. Furthermore, individual appellants argue that the procedures used by appellees to enact a water moratorium and grant water hookups violates their right to procedural due process. Appellant partnership and its general partner assert a precondemnation blight taking. Both the individuals and partnership challenge the grant of legislative immunity to the public utility's directors for their enactment of water moratoriums. Furthermore,

appellants contend that appellee Peter Warshall was dismissed pursuant to Fed.R.Civ.P. 41(a)(1). We have jurisdiction of appellants' timely appeal pursuant to 28 U.S.C. § 1291 (1982).

I. STATEMENT OF FACTS AND PROCEEDINGS

Appellants are individuals and a limited partnership and its general partner that either have owned or now own undeveloped property in Bolinas, a community located in Marin County, California. The individual appellants purchased undeveloped land zoned for residential use on different dates. Charles and Phyllis Gilbert purchased their property in 1955; James Macey, in 1979; and Matthew and Susan Lockary, in 1981. Appellant Mesa Ranch, Inc., a general partnership, and Anton Holter, its general partner, owned approximately 210 acres intended for commercial development.

Appellees Bolinas Community Public Utility District and its directors (hereinafter "BCPUD") govern the public provision of water in Bolinas. In 1971, BCPUD enacted a moratorium on new water hookups and has continued to reenact that moratorium until its last reenactment in 1977 ("1977 reenactment"). The Gilberts, Lockarys and Macey have never received water from BCPUD. Unlike the Gilberts, Lockarys, and Macey, Mesa Ranch actually did receive water from BCPUD.

Appellants filed suit on November 10, 1982. The district court granted BCPUD's motion to dismiss as to some defendants and claims while preserving the present constitutional claims against BCPUD. *Lockary v. Kayfetz*, 587 F.Supp. 631 (N.D. Cal.1984) (*Lockary I*). Although the

district court denied the motion to dismiss BCPUD's directors from the suit, the district court granted them absolute legislative immunity for their enactment of the water moratoriums. *Id.* at 638.

Appellee Peter Warshall filed his answer to the appellants' complaint with the district court on April 10, 1984. On May 20, 1985, Mesa Ranch and Anton Holter filed a notice of voluntary dismissal of Peter Warshall pursuant to Fed.R.Civ.P. 41(a)(1).

Appellants then filed a motion for abstention due to an alleged ripeness defect. BCPUD thereafter filed a motion for summary judgment on all of appellants' claims. The district court denied appellants' motion for abstention and granted summary judgment in favor of BCPUD on November 16, 1987. *Lockary v. Kayfetz*, No. 82-6191 (N.D.Ca. Nov. 16, 1987) (*Lockary II*).

II. DISCUSSION

A. STANDARD OF REVIEW

We review de novo a district court's grant or denial of a motion for summary judgment. *Securities and Exchange Comm'n v. Belmont Reid & Co.*, 794 F.2d 1388, 1390 (9th Cir.1986). We may affirm a grant of summary judgment only if the trial court properly found that no genuine issue exists as to any material fact and that the moving parties are entitled to judgment as a matter of law. *Loehr v. Ventura County Community College District*, 743 F.2d 1310, 1313 (9th Cir.1984).

B. INDIVIDUAL APPELLANTS: THE GILBERTS, THE LOCKARYS, AND MACEY

1. The Takings Claim

The Gilberts, Lockarys and Macey first contend that the district court erred in denying their motion for abstention because their takings claim was not yet ripe. Ripeness is a jurisdictional issue, *Austin v. City and County of Honolulu*, 840 F.2d 678, 680 n. 2 (9th Cir.1988), which we review de novo. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453 n. 4 (9th Cir.1987), *cert. denied*, 484 U.S. 1043, 108 S.Ct. 775, 98 L.Ed.2d 861 (1988).

The Gilberts, Lockarys and Macey argue that their claim suffers a ripeness defect because of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), a decision entered after appellants filed suit. *First English* explicitly disapproved of the California state law rule expressed in *Agins v. City of Tiburon*, 24 Cal.3d 266, 275-77, 598 P.2d 25, 29-31, 157 Cal.Rptr. 372, 375-76 (1979) (in bank), *aff'd on other grounds*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), which held that no state compensation is available for regulatory takings. The Gilberts, Lockarys and Macey argue that this disapproval may somehow have required them to attempt to pursue a remedy for a regulatory taking in California state court, lest they run afoul of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), which held that a fifth amendment takings claim is not ripe until the landowner had sought "compensation through the procedures the state has provided." *Id.* at 194-95, 105 S.Ct. at 3121. We reject their

contention. The appropriate point for determination of the adequacy of state compensation procedures occurs at the time the alleged taking occurs, *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990). Thus *First English* does not in any way affect the ripeness of their suit. Because no other ripeness problem exists, we reach the merits of the Gilberts', Lockarys' and Macey's takings claim.[1]

The Gilberts, Lockarys and Macey contend that BCPUD's refusal to grant them water hookups constitutes a regulatory taking of their property in violation of the fifth amendment. This claim encompasses two different kinds of takings challenges: an "as applied" challenge and a "facial challenge." *See, e.g., Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 876-77 (9th Cir.1987), *cert. denied*, 488 U.S. 827, 109 S.Ct. 79, 102 L.Ed.2d 55 (1988). Appellants' "as applied" challenge involves a claim that BCPUD's refusal to grant water hookups to them so damages the value of their land that it constitutes an unconstitutional taking of the appellants' property interest *in their land*. *See, e.g., id.* Their "facial challenge" attacks the mere enactment of the restriction

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[1] As of the time the Gilberts, Lockarys and Macey filed this appeal, they had received a final rejection of their applications for water hookups. Their takings claim thus meets the final decision requirement. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 297, 101 S.Ct. 2352, 2371, 69 L.Ed.2d 1 (1981) (for regulatory takings claim to be ripe landowner must first receive final decision regarding the application of the regulations to the property from the governmental entity charged with implementing the regulations).

as a taking of their property interest *in the water they seek to obtain*. The district court characterized appellants' claim solely as a facial challenge and found no triable issue of fact. We agree with that conclusion. However, because triable issues of fact surround appellants' as applied taking claim, we reverse.

BCPUD's failure to grant water hookups does not constitute a taking of the Gilberts', Lockarys' and Macey's interest in their land if it: 1) substantially advances a legitimate state interest; and 2) does not deny them economically viable use of his land. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3146-47, 97 L.Ed.2d 677 (1987). Here, there is a tenable claim that BCPUD's failure to grant water hookups to the Gilberts, Lockarys and Macey may deny them all economically viable use of their land.

A regulation which destroys a major portion of the land's value denies a property owner of all economically viable use of his land. *See Moore v. City of Costa Mesa*, 886 F.2d 260, 263 (9th Cir.1989). Whether a regulation denies landowners all economically viable use of their land requires consideration of the existence of other permissible uses of that land, *Agins v. City of Tiburon*, 447 U.S. 255, 262, 100 S.Ct. 2138, 2142, 65 L.Ed.2d 106 (1980), and the economic impact of the regulation and the extent to which it interferes with the landowners' reasonable investment backed expectations. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191, 105 S.Ct. 3108, 3118-19, 87 L.Ed.2d 126 (1985). Also included within this inquiry is the consideration whether the regulation caused the loss of economic viability. If the loss is caused by something other than the government

regulation, it does not constitute a taking. *See Bedford v. United States*, 192 U.S. 217, 225, 24 S.Ct. 238, 240, 48 L.Ed. 414 (1904).

The Gilberts, Lockarys and Macey have submitted evidence that Marin County conditions the grant of building permits on first securing water hookups from BCPUD for their residentially zoned land. Construing the evidence in the light most favorable to the Gilberts, Lockarys and Macey, BCPUD's refusal to grant them a water hookup prohibits them from building anything on their land. Additionally, they raise a genuine issue of material fact concerning whether a shortage of water caused a loss in the economic viability of their properties, as opposed to the arbitrary denial of water to their properties by BCPUD. *See infra* pp. 1155-56.

Withholding available water from land zoned exclusively for residential use might interfere with the landowners' reasonable investment-backed expectations by preventing all practical use of that land. *See Williamson County*, 473 U.S. at 191, 105 S.Ct. at 3118-19. That the Gilberts, Lockarys and Macey can still walk on, or ride a bike on, or look at their land does not, at this preliminary stage of the case, reassure us to the contrary. In this context, assuming the Gilberts, Lockarys and Macey can show that sufficient water was available, then BCPUD's water moratorium may indeed constitute more than a mere reduction in property value. *Cf. Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 560 (9th Cir.1984) (mere reduction in property value does not establish a denial of all economically viable use of property).

However, the determination of what constitutes an economically viable use of land requires a case-by-case factual analysis of the particular circumstances presented. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815 (1984). Resolution by plenary hearing rather than by summary judgment is particularly important for claims of regulatory taking. *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 177 (4th Cir.1988). Because appellants have raised triable issues of fact surrounding their as applied takings claim, we reverse and remand.

2. The Gilberts', Lockarys' and Macey's Equal Protection and Substantive Due Process Claims

The Gilberts, Lockarys and Macey contend that BCPUD's refusal to issue water hookups to them constitutes arbitrary conduct in violation of the equal protection and due process clauses because BCPUD's stated reason for denying water hookups, a water shortage, was pretextual.

The interest in water for real estate development is not a fundamental right. *Bank of America Nat'l Trust and Savings Ass'n v. Summerland County Water Dist.*, 767 F.2d 544, 548 (9th Cir.1985). Unless a classification trammels fundamental personal rights or implicates a suspect classification, to meet constitutional challenge the law in question needs only some rational relation to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04, 96 S.Ct. 2513, 2516-17, 49 L.Ed.2d 511 (1976). Scrutiny under equal protection analysis is essentially

equivalent to scrutiny under due process doctrine. *Herrington v. Sonoma County*, 834 F.2d 1488, 1495 n. 4 (9th Cir.1987), *cert. denied*, 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 860 (1989).

However, the rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary. *See Sinaloa*, 882 F.2d at 1409. We believe that the Gilberts, Lockarys and Macey stated a claim for a violation of substantive due process and equal protection. Although a water moratorium may be rationally related to a legitimate state interest in controlling a water shortage, the Gilberts, Lockarys and Macey have raised triable issues of fact surrounding the very existence of a water shortage. They have submitted affidavits showing that following the imposition of the moratorium water consumption in Bolinas has increased by approximately 70%, water storage capacity has increased by approximately 1100%, BCPUD has provided water for secondary units and swimming pools, and BCPUD has voluntarily relinquished rights to certain water sources. Additionally, an affidavit submitted by an engineer specializing in water management stated that BCPUD's leakage rate is at least double that of accepted norms and that BCPUD has sufficient water to permit population growth within the Bolinas area. Construed in the light most favorable to appellants, BCPUD's refusal to grant water hookups to the Gilberts, Lockarys and Macey may have been arbitrary or even malicious conduct prohibited by due process and equal protection. *See, e.g., id.* at 1409-10. We therefore reverse and remand so the Gilberts, Lockarys and Macey may have an opportunity to prove that BCPUD's conduct was arbitrary or malicious.

3. The Gilberts', Lockarys' and Macey's Procedural Due Process Claims

First, the Gilberts[2] contend that they did not receive adequate notice of the proceedings leading to the 1977 reenactment. Second, the Gilberts, Lockarys and Macey claim BCPUD failed to provide them with notice of the hearings held by BCPUD at which residents who already had water hookups petitioned for additional hookups to build additional housing or swimming pools. Third, the Gilberts, Lockarys and Macey claim that BCPUD directors, as current water users, could not have acted as impartial decision-makers in evaluating new applicants for water hookups.

Due process requires an opportunity for notice and a hearing "prior to the deprivation of a significant property interest." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19, 98 S.Ct. 1554, 1565, 56 L.Ed.2d 30, (1978). We reject the Gilberts' procedural due process claim because the 1977 reenactment did not deprive them of a property interest. The Gilberts had no property interest in the water they had not yet received. State law governs the definition of a property interest for purposes of a claim for denial of procedural due process. *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 737 (5th Cir.1988). Under California law, potential water users have no property interest in water not yet received. *See Hollister Park Investment Co. v. Goleta County Water Dist.*,

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[2] The Lockarys and Macey cannot assert a claim for BCPUD's failure to provide notice of the proceedings leading to the 1977 reenactment because they purchased their land subsequent to that reenactment.

82 Cal.App.3d 290, 294, 147 Cal.Rptr. 91, 93 (1978). Likewise, the Gilberts, Lockarys and Macey suffered no violation of procedural due process by not receiving notice to attend hearings to supply *other residents* with water in which they had no property interest.

The claim of Gilbert, Lockary and Macey that the BCPUD did not act as an impartial decision maker need not be addressed on this appeal because of our disposition of other dispositive issues in favor of appellants. We express no view of the impartial decision maker claim.

C. *APPELLANTS MESA RANCH AND ANTON HOLTER*

Mesa Ranch and Holter contend that their takings claim for precondemnation blight suffers a ripeness defect and that the district court erred in granting summary judgment to BCPUD on the merits.

We agree. Mesa Ranch and Holter must first seek compensation through state procedures before suing in federal court. *See Williamson*, 473 U.S. at 194-95, 105 S.Ct. at 3120-21. Despite the existence of a California state law remedy for precondemnation blight in state court, *see Klopping v. City of Whittier*, 8 Cal.3d 39, 51-52, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972), Mesa Ranch and Holter made no attempt to procure that relief first. Thus the district court had no jurisdiction to render judgment on the merits. We therefore reverse and remand to the district court for dismissal. In the alternative, if Mesa Ranch and Holter desire to proceed with their claim for precondemnation blight, on remand to the district court, the district court may permit Mesa Ranch and Holter to

amend their complaint to include a pendant state law *Klopping* claim. *See, e.g., Sinaloa*, 882 F.2d at 1404 n. 4. The district court should resolve the issue of costs and attorneys' fees in the first instance.

D. LEGISLATIVE IMMUNITY OF BCPUD DIRECTORS

All appellants challenge the district court's grant of legislative immunity to BCPUD directors in *Lockary I*. We have no jurisdiction over this claim due to the inadequacy of appellants' notice of appeal. The requirements of the content of a notice of appeal are jurisdictional, *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387, 98 S.Ct. 1117, 1121, 55 L.Ed.2d 357 (1978), and we consider that issue *sua sponte*. *See United Artist Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265, 1267 (9th Cir.1985).

Rule 3(c) of the Federal Rules of Appellate procedure requires that appellants' notice of appeal specify "the judgment, order or part thereof appealed from." The district court granted legislative immunity to BCPUD directors in *Lockary I*. However, appellants' notice of appeal only specifies an intention to appeal issues decided in *Lockary II*. We therefore dismiss the appeal of the grant of legislative immunity to BCPUD's directors.

E. THE DISMISSAL OF APPELLEE PETER WARSHALL

All appellants contend that the district court erred in refusing to strike Warshall's joinder in the summary judgment against them. They allege that he was properly

dismissed pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. Rule 41(a)(1) provides that:

> [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before *service by the adverse party of an answer.* . . .

Fed.R.Civ.P. 41(a)(1) (emphasis added). Although Warshall had filed an answer to appellants' complaint, the record indicates, and Warshall does not dispute, that he never served all appellants with that answer. Thus Warshall was properly dismissed when all the appellants filed a Rule 41(a)(1) motion to dismiss on May 20, 1985. We reverse the district court's refusal to dismiss Warshall and remand for dismissal

III. CONCLUSION

We reverse the grant of summary judgment on Gilberts', Lockarys' and Macey's as applied takings claim and remand to allow them to establish whether BCPUD's rejection of water hookups arbitrarily denies them all economically viable use of their land. We reverse the grant of summary judgment on the Gilberts', Lockarys', and Macey's due process and equal protection claims and remand to allow them to establish whether BCPUD's refusal to grant them water hookups constituted arbitrary conduct. We affirm the grant of summary judgment on the Gilberts', Lockarys' and Macey's claims of a denial of procedural due process resulting from inadequate notice. We dismiss the Gilberts', Lockarys' and Macey's appeal of a denial of procedural due process resulting from the lack of an impartial decision maker for failure to raise

that issue below. We reverse the grant of summary judgment on Mesa Ranch's and Holter's claim for a precondemnation blight taking because their claim was not ripe and remand for the district court to dismiss or allow amendment and determine whether the award of costs and fees in appropriate. We dismiss all the appellants' appeal of the grant of legislative immunity for BCPUD directors due to an inadequate notice of appeal. We reverse the district court's decision not be dismiss Warshall and remand for his dismissal.

AFFIRMED, in part, REVERSED, in part, and REMANDED.

APPENDIX I

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, et al., Plaintiffs, v. PAUL KAYFETZ, et al., Defendants.	NO. C 82-6191-SW ORDER DENYING PLAINTIFFS' MOTION FOR ABSTENTION AND GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (Filed Nov. 16, 1987)

This case puts before the court current disputes over the status of water rights in California as proper bases for constitutional claims based on the just compensation clause of the Fifth Amendment. Also in issue is the extent to which persons holding land outside the jurisdiction of a government body can hold it accountable for actions which devalue their land. Plaintiffs raise this second question in the guise of a "pre-condemnation" claim which is also presumptively based upon the just compensation clause of the Fifth Amendment.

Plaintiffs in this case are a consortium of past and present landowners. Part of the land which engendered this dispute is under the auspices of defendant Bolinas Community Public Utility District (hereinafter "BCPUD"), which supplies and regulates water for the

land within the District. Other defendants include present and former individual public officials who serve on the Board of BCPUD.

The plaintiffs contend that BCPUD has deprived them of the adequate use of their land throught the enactment of a water moratorium. Allegedly defendants caused this deprivation by denying plaintiffs any water hook-ups[1] while allowing increased water consumption by current users.

Plaintiffs' claims in their amended complaint fall into several areas: constitutional claims for taking of property without just compensation and for violation of due process, infringement of procedural due process rights in the refusal to allocate water hook-ups, and requests for abstention by this court due to the alleged uncertainty of state law on the takings issue.

In an effort to force the plaintiffs to delineate clearly the viable claims in the case, this court required all claims to be addressed by motion on October 7, 1987. On that date this court heard the following: plaintiffs' motion for abstention, defendants' motion for summary judgment on the inverse condemnation and due process claims, defendants' motion for summary judgment on the "pre-condemnation" claim of plaintiffs Mesa Ranch and Anton Holter, and defendants' motion for summary judgment on the issue of denial of procedural due process. This court GRANTED defendants' motion against plaintiffs

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[1] Plaintiffs also allege that these actions were done in furtherance of a conspiracy to discourage development in the Bolinas area.

Mesa Ranch and Anton Holter and took the remaining motions under submission. This court now DENIES plaintiffs' motion for abstention and GRANTS defendants' motions for summary judgment. This court also takes the opportunity to clarify its rationale for granting defendants Mesa Ranch and Holter's motion for summary judgment.

I. Plaintiff's Motion for Abstention

Since filing their original complaint, plaintiffs have requested that this court abstain from exercising jurisdiction. They argue that the Supreme Court's recent holding in *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S.Ct. 2378 (1987) overruled *Agins v. Tiburon*, 24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980) in which the California Supreme Court held that there is no remedy for an inverse condemnation suit based upon a regulatory taking. Plaintiffs claim, therefore, that state law concerning available remedies for temporary regulatory takings is unclear and abstention is required.

Abstention is appropriate only as an "extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy." *Canton v. Spokane School District #81*, 498 F.2d 840, 845 (9th Cir. 1980). However, application of the doctrine is warranted where 1) the case involves issues of sensitive social policy, 2) a definitive state ruling on the issue(s) would terminate the controversy, thereby eliminating the need for constitutional adjudication, and 3) the potentially determinative issue of

state law is doubtful. *Id.* (citing *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 498-99 (1941)).

As to the first requirement, this court assumes arguendo that water rights issues, like land use planning, *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983), are a sensitive area of social policy.

The second requirement involves analyzing whether constitutional adjudication would be precluded if the California Supreme Court overruled *Agins* and adopted the *First English* formulation of remedies for California property rights. Even if the California Supreme Court chooses to reverse itself in *Agins*, an action which it has not yet taken, the plaintiffs in this case would not be precluded from asserting their federal rights. However, under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1984), "a property owner has not suffered a violation of the Just Compensation clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State. . . ." Therefore, as this action has not been first brought in state court, this court would have to abstain.

However, as to the third requirement, whether the possibly determinative issue of state law is doubtful, the court finds that plaintiffs have not sustained their burden of proof. *First English* did not, as plaintiffs maintain, explicitly overrule *Agins*. Rather, the Court held that "on *these* facts the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." *First English*, 207 S.Ct. at 2383 (emphasis added). The *First English* holding is limited to

those regulatory actions "where the government's activities have already worked a taking of *all use of property*. . . . " *Id.* at 2389 (emphasis added). In *First English* the defendant had enacted a zoning ordinance that, on its face, expressly prohibited all development of the plaintiffs' property. *Id.* at 2381-82. The water moratorium in this case does not effect such a complete loss of use of the plaintiffs' property.

Furthermore, the direct legal effect of *First English* is limited to federal law. Although California courts must recognize the existence of Fifth Amendment remedies for such regulatory takings, *First English* does not require state courts to acknowledge a compensation remedy under state law.

In addition, the Court in *First English* did not state that the available remedy for temporary regulatory takings would apply to property rights other than land. Given the California courts' reluctance to find a property right in water for potential users, *see McMillan v. Goleta Water District*, 792 F.2d 1453, 1457-58 (9th Cir. 1986), *cert. denied* 107 S.Ct. 1348 (1987) (defendant's water moratorium is constitutional as applied to potential users of water); *Hollister Park Investment Co. v. Goleta County Water District*, 82 Cal.App.3d 290, 294, 147 Cal.Rptr. 91, 93 (1978) (potential water user does not possess same rights as existing water users in a water district); *Swanson v. Marin Municipal Water District*, 56 Cal.App.3d 512, 522, 128 Cal.Rptr. 485, 491 (1976) (potential water user does not possess any absolute right to water service), this court holds that, until *Agins* is explicitly overruled, state law on the issue is clear: plaintiffs, as non-users, have no

property right in the water sufficient to support a takings claim.

For the above reasons, plaintiffs' motion for abstention is hereby DENIED.

II. Defendants' Motion for Summary Judgment on Inverse Condemnation and Due Process Claims

Plaintiffs claim that BCUPD's moratorium on new water hook-ups constituted a taking of their property without just compensation or due process in violation of the Fifth Amendment. Defendants claim that plaintiffs, as mere potential users of the water, have no property right upon which to base a claim.

Although an inverse condemnation or due process claim can be based on a taking or deprivation of "life, liberty or property" under a clause of the Fifth Amendment, what constitutes a property interest is a matter of state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). California courts, recognizing the necessity of balancing limited resources with the increasing public need for those resources, have decided that mere potential water users have no property interests therein. *McMillan*, 792 F.2d at 1457-58; *Hollister Park*, 82 Cal.App. 3d at 294, 147 Cal. Rptr. at 93; *Swanson*, 56 Cal.App.3d at 522, 128 Cal.Rptr. at 491. Therefore, this court holds that plaintiffs have no property right in the water upon which to base an inverse condemnation or due process claim.

For their part, plaintiffs argue that the water moratorium in this case results in a deprivation of all use of their property and is thus actionable under *First English*.

207 S.Ct. at 2389. Furthermore, plaintiffs contend that the BCPUD moratorium does not substantially advance a legitimate state interest as required under *Nollan v. California Coastal Comm'n,* 107 S.Ct 3141 (1987). However, both of these cases are readily distinguishable in that they involved pre-existing property rights. Neither case involved a moratorium on public services or the ability of a potential recipient of such services to maintain a takings claim.

In the instant case, what the plaintiffs are really suing for, despite their protestations to the contrary, is the cumulative right to use the land which they already possess *plus* the right to have water upon the land. Any alleged interference with plaintiffs' use of the land would flow from interference with the acquisition of water rights. Plaintiffs are still free to use and to sell the land or to develop it to the extent they can without water from BCPUD. As plaintiffs do not possess a property right upon which to sue on either an inverse condemnation or a due process claim, defendants' motion for summary judgment as to these causes of action is GRANTED.

III. Defendants' Motion for Summary Judgment on Procedural Due Process Claims

Plaintiffs claim that the Board of BCUPD failed to send property owners individualized notice of the hearing on the water moratorium and that such failure violated their procedural due process rights. Plaintiffs go to great lengths to distinguish the seminal case on procedural due process, *Bi-Metallic Investment Co. v. State Board of Equalization,* 239 U.S. 441, 445 (1915), where the

Court held that notice to affected parties was not required before an increased valuation of taxable property could be made.

First, plaintiffs contend that unlike the situation in *Bi-Metallic*, all property owners do not stand alike in this case. Although the impact of the moratorium on various property owners is quite disparate depending on whether they already had water hook-ups or not, this court finds more dispositive the fact that here, unlike the case in *Bi-Metallic*, statutory notice was given and plaintiffs *were* provided an opportunity to be heard. The BCPUD Board complied with the requirements for notification of the public set forth in Cal. Water Code Section 352 (West 1971).[2]

Second, plaintiffs contend that they have no political power to change the California Water Code statute, and that, therefore, the reasoning behind the *Bi-Metallic* decision is inapposite. This court acknowledges the concern of the *Bi-Metallic* Court that due process and fairness be assured through the inherent power of the political process to change unpopular regulations. The Court viewed this method of guaranteeing procedural due process as an alternative avenue to judicial intervention in the administrative agency system.

---

[2] Section 352 of the California Water Code requires that "[n]otice of the time and place of hearing shall be published pursuant to Section 6061 of the Government Code at least seven days prior to the date of hearing in a newspaper printed, published, and circulated within the area in which the water supply is distributed, or if there is no such newspaper, in any newspaper printed, published, and circulated in the county in which the area is located."

However, contrary to plaintiffs' argument, even non-residents of Bolinas can affect the legislative process. The statute allowing notice by publication to suffice for due process purposes was a California Water Code statute, not a statute peculiar to Bolinas. Plaintiffs could therefore have protested the statute through state-wide political processes.

Plaintiffs, however, claim that *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795 (1983) establishes that *individualized notice*, not the notice by publication as provided for by statute, is constitutionally required in this case. Even assuming arguendo that individualized notice is required under *Mennonite* when a moratorium of this kind is enacted, the right to procedural due process must arise from the deprivation of property. Again, the court is disinclined to recognize that prospective water rights constitute property. The value being affected by the moratorium is the value of the land with the addition of water. Since plaintiffs have no property right in California to the water and still have the inherent value of the land which they purchased without the attendant water rights, there is no property right upon which to base a due process claim. The court therefore GRANTS defendants' motion for summary judgment.

IV. Defendants' Motion for Summary Judgment Against Plaintiffs Mesa Ranch and Anton Holter

Plaintiffs Mesa Ranch and Anton Holter (hereinafter "Mesa Ranch"), are in a unique position in this case in that they are not subject to the moratorium. Plaintiff Mesa Ranch admits that nearly all of its 210 acres are outside

the BCPUD service area. In spite of this seemingly determinative fact, plaintiffs argue that actions taken by the BCPUD Board in the context of a hearing of the California Coastal Commission constitute a "precondemnation de facto taking." The gist of plaintiffs' argument is that BCPUD caused a de facto precondemnation taking "by engaging in unreasonable and oppressive conduct for the purpose of artificially depressing the value of the Mesa Ranch property prior to acquiring it as a water reservoir site." (Plaintiffs' Opposition to Defendants' Motion for Summary Judgment Against Mesa Ranch and Holter, p. 1).

If a public agency acts unreasonably in issuing precondemnation statements, the owner of the property to be condemned is entitled to compensation. *Klopping v. City of Whittier*, 8 Cal.3d 39, 52, 500 P.2d 1345, 1355, 104 Cal.Rptr. 1, 11 (1972). However, mere intentions of condemnation, such as the announcement of a general plan, are "several leagues short" of the requisite level of announcement of firm intentions that would cause a devaluation of plaintiffs' property. *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 119, 514 P.2d 111, 117, 109 Cal.Rptr. 799, 805 (1973).

The actions allegedly taken by BCPUD officials, including advising the California Coastal Commission that Mesa Ranch contained the only remaining physically usable site for a BCPUD reservoir and applying for a grant to build such a reservoir, do not rise to the level of condemnation proceedings. Such actions do not demonstrate "a firm declaration of an intention to condemn property." *Id.* Defendants had not taken the kind of concrete action that practically assures that condemnation

will follow. As "[n]either *Klopping* nor any other decision . . . holds that enactment of a general plan for the future development of an area, indicating potential public uses of privately owned land, amounts to inverse condemnation of that land," *id.*, 514 P.2d at 116, 109 Cal.Rptr. at 804, defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

DATED: 11/16/87

/s/ Spencer Williams
United States
District Court
Judge

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW LOCKARY, et. al., Plaintiff, v. PAUL KAYFETZ, et. al.; VICTOR AMOROSO; MARY LOWRY; DIANA LOPEZ FRANSWORTH; FREDERICK B. MCCLELLAN, et. al.; PETER WARSHALL, et. al., Defendants-Appellees, v. PACIFIC LEGAL FOUNDATION, Appellant.	No. 91-15384 D.C. No. CV-82-6191-SW ORDER (Filed Oct. 21, 1992)

Before: GOODWIN, FLETCHER and T.G. NELSON, Circuit Judges.

Pacific Legal Foundation and Bolinas Community Public Utility District each shall file simultaneous responses to the other's petition for rehearing They shall not exceed fifteen (15) pages in length and shall be filed on or before twenty-one days from the date of this order.

Pacific Legal Foundation's motion to augment the record is denied.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW LOCKARY, et. al., Plaintiff, v. PAUL KAYFETZ, et. al.; VICTOR AMOROSO; MARY LOWRY; DIANA LOPEZ FRANSWORTH; FREDERICK B. MCCLELLAN, et. al.; PETER WARSHALL, et. al., Defendants-Appellees, v. PACIFIC LEGAL FOUNDATION, Appellant.	No. 91-15384 D.C. No. CV-82-6191-SW ORDER (Filed Dec. 16, 1992)

Before: GOODWIN, FLETCHER and T.G. NELSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW LOCKARY, et al., Plaintiffs, v. PAUL KAYFETZ, et al., Appellees.	)	No. 91-15384
PACIFIC LEGAL FOUNDATION, Appellant.	)	

On Appeal from the United
States District Court for the
Northern District of California

MOTION TO AUGMENT THE RECORD

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Attorneys for Appellant,
Pacific Legal Foundation

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATTHEW LOCKARY, et al., Plaintiffs, v. PAUL KAYFETZ, et al., Appellees.	No. 91-15384
PACIFIC LEGAL FOUNDATION, Appellant.	

On Appeal from the United States District Court for the Northern District of California

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MOTION TO AUGMENT THE RECORD

Appellant Pacific Legal Foundation moves this Court for permission to augment the record in this matter with the following materials:

1. Letters dated May 13, 1991, and May 28, 1991, signed by Richard E.V. Harris establishing the settlement agreement between plaintiffs and defendants below providing for the dismissal of the federal action on payment of $75,000 in damages to plaintiffs and acknowledging plaintiffs' right to continue their state court action. A

copy of the check paying $75,000 in damages is also included;

2. Points and Authorities in Support of Motion for Peremptory Writ of Mandate to invalidate Moratorium in *Gilbert v. State of California,* Alameda County Superior Court, No. 636481-0;

3. the deposition of Charles Gilbert in the above-mentioned *Gilbert v. State of California;* and

4. a handwritten letter dated September 10, 1992, from Anton G. Holter to Ronald A. Zumbrun.

The grounds for this motion are as follows:

This appeal concerns the propriety of sanctions levied on Pacific Legal Foundation, which is neither an attorney nor a party to the underlying action. In its decision in this case, the Court described the relationship between Pacific Legal Foundation and the plaintiffs as follows:

> [T]he nominal plaintiffs were merely pawns or puppets . . . . Tellingly, once this court reversed in part the district court's grant of summary judgment against PLF's "clients", thereby setting in the appellate court opinion the kind of precedent PLF sought, the nominal plaintiffs petitioned the district court to dismiss the suit with prejudice. . . . The named plaintiffs gained nothing.

Slip op. at 10917.

The factual error of this statement of the Court is made plain by the materials sought to be added to the

record. A motion for rehearing and suggestion for rehearing en banc has been filed and consideration of this material is essential for a proper resolution of this motion.

The items in the first category establish the error of the Court's statement that "the named plaintiffs gained nothing." In fact, the named plaintiffs settled their federal damage claims with the defendants for a monetary settlement of $75,000 for delay damages. The settlement also acknowledged the plaintiffs' right to continue their state court action for water hookups.

The state court pleading further establishes that plaintiffs did not simply walk away from their claims once the federal action was settled. In fact, the plaintiffs moved their claims and their attempts to gain water hookups for their properties from federal to state court. This pleading, filed before the dismissal of the federal action, demonstrates the scope of the state court action. Inasmuch as the District Court had originally ruled against the plaintiffs and had for three years prosecuted massive sanctions against plaintiffs, plaintiffs' counsel, and Pacific Legal Foundation, the plaintiffs believed that they would not be able to receive a favorable decision in the District Court. Thus, it was to the plaintiffs' advantage to settle their federal damages for a $75,000 cash payment for temporary loss of use and attempt to press their claim for a water hookup in state court.

Finally, the deposition of Charles Gilbert in the state court action reveals that the Gilberts were not merely "nominal plaintiffs" nor were they "pawns" or "puppets" of Pacific Legal Foundation. In the deposition, Mr. Gilbert

describes how he bought his property in Bolinas and what he intended to use it for. Deposition of Charles Gilbert at 7:11-26, 8:1-5. He details the steps that he went through in an attempt to get a water connection for the property and how he was rebuffed at each attempt. *E.g., id.* at 11:7-26, 12:1-5, 25:7-21, 32:12-19. Finally, Gilbert reveals that it was he that contacted Pacific Legal Foundation for assistance, not the other way around. *Id.* at 30:23-24, 35:21-26, 36:1-10.

The last item is a handwritten letter from Anton Holter to Ronald Zumbrun, one of the attorneys for plaintiffs below. In the letter, Holter expresses his anger at being referred to as a "pawn" or "puppet."

These materials were not placed in the original record because they were created, and concern events that occurred, after the sanctions were imposed. Appellant could not foresee that material created after the decision of the court that was the subject of the appeal would become as relevant to that appeal as the panel apparently believes. Nothing in the decision below suggested that the District Court did not believe that the plaintiffs had real claims nor have any of the defendants made such an argument. Indeed, the defendants agreed to pay plaintiffs a cash settlement of $75,000 in order to conclude the federal case. Because these events took place *after* the sanctions proceedings were concluded and because neither the lower court nor the defendants were making such an argument, appellant could not reasonably foresee a need to include such material in the record.

It appears that the entire basis of the opinion rests on the erroneous belief of the panel that the plaintiffs in the

action had no stake in the controversy. Such facts, of course, do not appear in the record, and as the attached material demonstrates, quite the opposite is true.

In order for the panel's decision to be based on the true state of the facts, it is necessary for this Motion to Augment the Record to be granted.

DATED: September 21, 1992.

Respectfully submitted,

JOHN H. FINDLEY
ANTHONY T. CASO

By /s/ Anthony T. Caso
ANTHONY T. CASO

Attorneys for Appellant,
Pacific Legal Foundation

EXHIBIT A-1

ORRICK, HERRINGTON
& SUTCLIFFE

Direct Dial

May 13, 1991

Orrin F. Finch, Esq.
Pacific Legal Foundation
2700 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833

[TELECOPIED]

Re: Bolinas Litigation

Dear Mr. Finch:

This will confirm our conversation regarding the procedures we will use. I will receive and hold the settlement documents as follows. You will provide me with the following:

(a) Plaintiffs' request for dismissal with prejudice, waiver of attorneys fees, and form of order in *Lockary*;

(b) Plaintiffs' waiver of claims and right to appeal (excepting the two currently remaining writ claims) and form of order in *Gilbert*;

(c) The original of the no plans/intentions/desires/expectations letter signed by you, Stephens, Zumbrun and each of the plaintiffs. (Multiple orginals of the complete letter will be acceptable, if it is incovenient to get signatures of each of the plaintiffs on a single letter.)

I will secure the following:

(a) The defendants' statement of no objection to the requested dismissal with prejudice and order.

(b) Funds for the issuance of a check in the amount of seventy-five thousand dollars ($75,000.) to be made payable to: "Charles Gilbert, Phyllis Gilbert, Matthew Lockary, Susan Lockary, James Macey, Ronald Zumbrun, Orrin Finch, Richard Stephens, and the Pacific Legal Foundation" and to state on the back simply: "In release and satisfaction of all of plaintiffs' claims for damages in *Lockary* and in *Gilbert*:".

When I have all of the above in the form I previously provided you, (a) I will cause to be filed in *Lockary* the plaintiffs' request for dismissal and defendants' statement and seek entry of the requested order of dismissal with prejudice; and (b) I will cause to filed in *Gilbert* the plaintiff's waiver and seek entry of the requested order. When I have the conformed orders in hand, I will notify you and you will provide me with written authorization to date the intentions letter with the date of the orders (or, if different, the later of the two dates). The authorization from you to date the letters will be in the form attached. Upon receipt of the original, signed authorization signed by you, I will send you the check, together with copies of the orders.

Lastly, per my telephone conversation today with Dick Stephens: Although "Does" are not expressly mentioned in the form of waiver in *Gilbert*, the plaintiffs' waiver is intended to dismiss any and all "Does" to the extent, if any, that they are not already dismissed or not already deemed dismissed.

If you have any questions, please contact me immediately.

Very truly yours,

/s/ Richard E.V. Harris
Richard E.V. Harris

EXHIBIT A-2

ORRICK, HERRINGTON
& SUTCLIFFE

Direct Dial
(415) 773-5787

May 28, 1991

Orrin F. Finch, Esq.
Pacific Legal Foundation
2700 Gateway Oaks Drive, Suite 200
Sacramento, CA 95833

Re: Bolinas Litigation

Dear Mr. Finch:

I have received your letter of authorization regarding the date of your previously-undated letter, which shall now be deemed to have been dated May 23, 1991. Pursuant to my letter of May 13, 1991, enclosed is the check together with file-stamped copies of the *Lockary* and *Gilbert* orders.

Very truly yours,

/s/ Richard E.V. Harris
Richard E.V. Harris

REVH:ksk
Enclosures

EXHIBIT A-3

ORIGINAL TO ACCOUNTING

BY ENDORSEMENT THIS CHECK WHEN PAID IS ACCEPTED IN FULL PAYMENT OF THE FOLLOWING ITEMS			
DATE		AMOUNT	

ORRICK HERRINGTON & SUTCLIFFE
ATTORNEY CLIENT TRUST FUND
600 MONTGOMERY ST.
SAN FRANCISCO, CA 94111

1273

1135
1210

May 23, 19 91

PAY TO THE ORDER OF Charles Gilbert,Phyllis Gilbert,Matthew Lockary,Susan Lockary,James Macey,Ronald Zumbrun,Orrin Finch,Richard Stephens, & Pacific Legal Foundation

$ 75,000.00

PAY EXACTLY 75,000 00 CTS DOLLARS

Bank of America
San Francisco Main Office 0033
Box 37001 Rincon Annex
San Francisco, CA 94137

⑈001273⑈ ⑆121000358⑆ 00331 06224⑈

2972-2001 5788

BEST AVAILABLE COPY

EXHIBIT B

RONALD A. ZUMBRUN
ORRIN F. FINCH
RICHARD M. STEPHENS
Pacific Legal Foundation
2700 Gateway Oaks Drive, Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Petitioners
and Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

CHARLES GILBERT; PHYLLIS GILBERT; MATTHEW LOCKARY; SUSAN IRLAND LOCKARY and JAMES MACEY,

Petitioners and Plaintiffs,

v.

STATE OF CALIFORNIA; DEPARTMENT OF HEALTH SERVICES; KENNETH KIZER, in his official capacity as Director of the Department of Health Services; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT; and DOES I THROUGH XX,

Respondents and Defendants.

No. 636481-0

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PEREMPTORY WRIT OF MANDATE TO INVALIDATE MORATORIUM

(Filed Mar 7, 1990)

* * *

EXHIBIT C

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

CHARLES GILBERT; PHYLLIS GILBERT; MATTHEW LOCKARY; SUSAN IRLAND LOCKARY; and JAMES MACEY,

Petitioners and Plaintiffs,

vs.

STATE OF CALIFORNIA, DEPARTMENT OF HEALTH SERVICES; KENNETH KIZER in his official capacity as Director of the Department of Health Services; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT and DOES I through XX,

Respondents and Defendants.

No. 636481-0

DEPOSITION OF:

CHARLES W. GILBERT

February 18, 1988

(Pages 1—68)

[Excerpted]

Reported by:
JUDITH A. BEAMER, CSR #2305

* * *

Q. I would like to turn now to your property and your contacts with the Bolinas area.

When did you purchase property for the first time in Bolinas?

A. In 1955.

Q. Approximately how much property did you purchase at that time?

A. We purchased three lots, each being twenty by a hundred.

Q. How much did you pay for the property?

A. $600.

Q. I assume that the lots were undeveloped?

A. Yes.

Q. And at the time that you purchased these lots, what were your intentions with respect to the use you would put those lots to?

[p. 8] A. We intended to build a two-room—two bedroom cabin for summer vacations and possibly for my retirement years.

* * *

Q. Taking for right now the moratorium that was first imposed in late 1971, do you recall about how long after the imposition of the moratorium—how long it was before you learned about it?

A. No, I do not remember. Probably a few months.

Q. When you first learned that the moratorium had been imposed, did you take any action in response to that information?

A. Yes. I went over and asked for an application to be put on the list at the BCPUD office. And I was told at that time they were not taking any names. They would not give me an application form.

Q. Do you recall who told you that?

A. No. It was a woman at the office.

Q. Other than that, did you take any other action?

A. I filed an application—I believe about 1975 or [p. 12] '76--at which time they gave me an application form. I filled it out there and turned it in.

Q. When you first learned of the moratorium, did it come as a surprise to you?

A. Yes.

* * *

Q. Was the source of their frustration the moratorium?

A. Yes.

Q. Were there any discussions as to the need, or perceived lack of need, for the moratorium?

A. Yes, there was at that point.

Q. And what was said in that regard?

A. They felt that the moratorium, in most cases, was not--was more of apolitical motivation than lack of water.

Q. Can you identify for me any of the individuals that were discussing this at this 1976 meeting?

A. Generally, the one that I remember as being one, one of the officers, is John Duncan.

Q. Now is it correct that the membership of the BPOA at that time--at least it appeared to you, anyway--[p. 17] consisted primarily of people who had not yet been able to develop their property in Bolinas?

A. Yes.

Q. Now, when these people were discussing their belief that the moratorium was political and politically motivated rather than motivated by a lack of water, did this come as a surprise to you?

A. No.

Q. Was that also your view before you went to the meeting?

A. My view was, based upon going down once a year, seeing other houses that were not there the year before--what they referred to as "ten-by-tens"--with water going to them, and also a bus, for example, with people living in it, with a hose going to it, it seemed from our observations the people were moving in and using water and yet there was no water for us who owned the property.

Q. So is it fair to say, even prior going to this meeting in 1976, it was your perception that there was no basis for the moratorium?

A. I felt that either--something was wrong.

Q. Did you have any more of a refined understanding as to what was wrong?

A. Well, I didn't find any really refined answers until I contacted the Legal Foundation for the--to research it out and assist us; find out what was underlying [p. 18] it.

Q. So at least in early 1976, before you went to this meeting, you had a feeling that something was wrong but you weren't sure exactly what?

A. Right.

Q. Now I think you said that the discussions in this BPOA meeting in early 1976 expressed the view that the moratorium was politically motivated?

A. Yes.

Q. Can you explain in more detail what was said in that regard?

A. No.

I remember one individual being very angry because she was able to drill a well on her property; and somebody, in the night, filled it up with cement.

Another one was told if they built a house on their property, it would be burnt down before it was completed.

Those two were outstanding, but I do not remember any other specifics. It was discussed at those meetings. The general tone, as I remember, was total frustration.

* * *

Q. During that same period, what steps, if any, did you take in connection with the efforts to develop your property, other than the BCPUD contacts?

A. Since there was a moratorium, there was no effort made because it was—

Oh, excuse me. Back up. I did contact the County during that period—Marin County—directly. I asked was it permissible to get a building permit and have a water storage facility for water. And I was refused because you had to have the water hookup in order to get a building permit.

At that time we were thinking about building a cabin and going down Saturday at noon, coming back Sunday at noon. And it would not take a great deal of water and storage to do that. And I was refused by Marin County.

Q. Now when you proposed this to the County, was this in a telephone conversation?

A. I believe I went in directly, at that time, into the Marin County Planning Office, or whatever office I went into at that point.

[p. 26] Q. Did you have any plans or any kind of a document that described what it was that you planned on doing?

A. No. We wanted to make sure it was possible before we went out and paid an architect's fee.

Q. Conceptual like, to do—can we get a permit, assuming that all the requirements are met?

A. Right.

Q. Remember the first rule: You got to wait until I finish my question.

A. All right.

Q. Now during the period 1971 through 1977, did you make any investigation as to whether it was feasible to put a well on your property?

A. No, I did not.

Q. Do you recall, when you talked to this person at the County, about how big of a storage tank you had in mind?

A. No. They just gave the information without a water meter hookup. There would be no building permit; we never got that far.

* * *

APPENDIX M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, et al.,

Plaintiffs,

v.

PAUL KAYFETZ, et al.,

Defendants.

NO. C 82 6191 SW/WDB

DRAFT RECOMMENDATION OF SPECIAL MASTER RE LIABILITY OF PLAINTIFFS AND THEIR COUNSEL FOR DEFENDANTS' ATTORNEYS' FEES AND COSTS

(Filed Sept. 8, 1989)

_____/

On November 16, 1987, the District Court, by the Honorable Spencer Williams, granted summary judgment to defendants on all remaining claims in plaintiffs' amended complaint, and defendants subsequently moved for attorneys' fees. The District Court referred defendants' motions to this court, as special master, on June 22, 1988. Prior to referral, the parties had briefed the motions in anticipation of hearing by Judge Williams, who at that time had a familiarity with the case spanning six years.

Due to conflicting schedules of counsel, a status conference was not held by this court until October 6, 1988. At that time, the court determined that defendants had presented substantial bases for their claims for attorneys' fees--claims that plaintiffs had not adequately rebutted. The court also determined that because the briefs

reflected the parties' expectation of a hearing before a judge intimately familiar with the numerous factual and legal issues presented by this case, those briefs were inadequate to support a fully competent decision by a judicial officer previously unfamiliar with the case. Thus, necessity required the filing of supplemental briefs by the parties and this court so ordered.

The following recommendation is made upon the basis of those briefs and the prior and supplemental record. In addition, the court has called for and received briefs on the First Amendment and other concerns that may arise when, as here, a nonprofit, "public interest" law firm faces sanctions after bringing claims on behalf of plaintiffs who may be within a political minority.

Having bifurcated the attorneys' fees proceedings, with subsequent briefing and hearing to be had on the issue of the amount of this attorneys' fees award, the court limits this recommendation to the issue of liability.

Due to a particular concern for the sensitive issues arising herein, and pursuant to Federal Rule of Civil Procedure 53(e)(5) and this court's Minute Order of March 14, 1989, the court issues this recommendation and the accompanying proposed findings of fact in draft form, and now permits each party to file suggestions with this court in the form of a brief not to exceed twenty-five (25) pages due no later than ten (10) days from this date.

* * *

148. PLF attorneys, on behalf of plaintiffs and the Pacific Legal Foundation, have opposed defendants' motions, in part, by rearguing the merits with essentially the same legal claims previously dismissed in this and the state court *Gilbert* action. They have done so in an attempt to show the absence of frivolousness in those claims. They have also argued the various legal bases for fees and substantiated the lengthy pre-filing inquiry done by PLF attorney and non-attorney staff. They have largely ignored the critical substantive claim upon which defendants' motions focus—that plaintiffs and their counsel filed and pursued this action in bad faith.

149. Plaintiffs' counsel, separately and together as Pacific Legal Foundation, and the Mesa Ranch plaintiffs, brought and pursued this action without reasonable basis, recklessly, and in bad faith.

* * *

IV. APPLICATION OF RELEVANT SANCTIONS LAW TO THE CONDUCT OF THIS LITIGATION BY PACIFIC LEGAL FOUNDATION AND THE MESA RANCH PLAINTIFFS

A. The Bad Faith Conduct of This Litigation

Imposing sanctions of any kind is a matter of considerable consequence in any kind of case. Imposing substantial economic sanctions in a case that is predicated in part on assertions of claims allegedly based on important civil rights is extremely serious. In recognition of these facts, the court has proceeded cautiously and thoroughly in considering these most sensitive matters. The court

takes no pleasure in announcing the conclusion that it feels is compelled by all of the considerations described here: that Pacific Legal Foundation and at least two of its clients in this matter, plaintiffs Mesa Ranch and its general partner, Anton Holter, filed and prosecuted this entire case in bad faith. We conclude that PLF and the Mesa Ranch plaintiffs actually understood, from prior experience in related but unsuccessful actions in state court and from their hundreds of hours of pre-filing research in this case, that under well-established principals of law, they had no right to relief on any of the legal theories they advanced in their original or their amended complaint, but that, despite this knowledge, they decided to vigorously prosecute this case in an effort to use the burdens and fears that litigation of this magnitude can create to pressure defendants and other, similarly situated governmental units into changing political policy decisions that had the effect of limiting economic development and interfering with private parties' free use of their real property. In other words, the court has concluded that PLF and Mesa Ranch self-consciously decided to abuse the judicial process by pursuing this lawsuit not in an effort to win on the merits, but in an attempt to intimidate and harass their political adversaries into changing policy decisions that PLF and Mesa Ranch were not capable of changing through the political process.

We detail the reasoning that supports these disturbing conclusions in the pages that follow. As we will point out, the circumstances that support our conclusion include the plaintiffs' prior and contemporary experience in related state court actions, their extensive pre-filing research in this action, the nature of the claims they set

forth in the original complaint and the first amended complaint, the manner in which those claims were presented (in studied obfuscation and conclusory allegations), the persons they chose to name as defendants, the nature of the relief plaintiffs sought, the amount of damages they claimed, the way the PLF attorneys responded to Judge Williams' warnings and the pretrial tactics in which those attorneys engaged.

Before turning to these specifics, however, it is important to emphasize one of the most telling facts about how PLF prosecuted this case. PLF and its clients were angry about the policy decisions made by the BCPUD; they resented the fact that the Board's moratorium on water hook-ups had the effect of limiting what they could do with their properties. In fact, they were certain that the principal motive that inspired the Board's decisions to impose the moratorium and not to invest in projects that would significantly increase the available water in the district was hostility to growth rather than any real concern about health and safety. We do not dispute that there is evidence to support the view that hostility to growth played a major role in the Board's decisions about water policy. And we have no reason to doubt that plaintiffs' and PLF's anger and sense of frustration were real.

Where we part ways, fundamentally, with PLF and plaintiffs, however, is over *how* they decided to respond to that anger and frustration. They shunned the most obvious and straightforward courses. They decided not to file an action in which the Board itself would be the only defendant. They decided not to limit their prayer for

relief to the voiding of the moratorium and to just compensation for the actual economic losses they had suffered as a result of being denied access to BCPUD water. Perhaps most significantly, they decided not to present their legal theories, and the factual predicates for them, in a direct and honest manner.

PLF and its clients could have either asked the court in a straightforward manner, to apply established legal norms to the facts, or tried to persuade the court, directly, to change well-settled legal doctrine. Had they chosen either of these obviously available courses, they would have imposed *much* less on defendants and the court, the merits of their arguments could have been fairly and efficiently considered, and their conduct would not have been sanctionable. But PLF and its clients rejected these clear and unexceptionable alternatives.

At the heart of the plaintiffs' case was deep-seated disaffection with a legislative policy decision made by BCPUD. PLF obviously knew that it could challenge that decision simply by asking the court, under substantive due process norms, to declare that there was no rational connection between the moratorium on new water hookups and its purported health and safety purposes. We must infer that after more than 400 hours of pre-filing research and substantial experience in similarly inspired litigation in other courts, PLF knew that a suit so framed was likely to end quickly (by the granting of a motion to dismiss or for judgment on the pleadings) because over the past 50 years federal courts have developed a legal standard for this kind of challenge to legislative acts that is virtually impossible to satisfy. Under that standard, if

the only interest adversely affected is economic, a challenger to a legislative act who relies on substantive due process norms must eliminate the possibility that a rational legislative body might conclude that the act in question might contribute something to a legitimate legislative end.

Perceiving this obstacle, PLF and its clients decided not to frame the question directly and try to persuade the courts that the moratorium was patently irrational. They also decided not to try to persuade the courts to modify the legal standard under substantive due process analysis so as to give challenges to legislative acts a fighting chance in the courts. Instead, PLF and its clients attempted to conceal the nature of the governmental act they were challenging in order to induce the courts to apply a legal standard more generous to plaintiffs. Responding to defendants' motion to dismiss, PLF argued that "[t]he declaration of such a water emergency by a water distributor is not a legislative act. Absent the findings and determinations required by section 350 a water emergency may not be declared. *See Swanson v. Marin Municipal Water District*, 56 Cal.App.3d at 524. . . ."[20] However, *Swanson* actually holds that "by declaring a water shortage emergency condition and enacting a moratorium on new water service, District was acting in a *legislative*, rather than an adjudicatory, capacity." *Swanson v. Marin Municipal Water District*, 56 Cal.App.3d 512, 519 (1976) (emphasis added). We find that this blatant misstatement of the law by PLF was inspired by a desire

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[20] Plaintiffs' Consol. Memo in Opp. to Defendants' Motions to Dismiss, p. 20:8-12, Dkt. No. 75.

to obscure fundamental vulnerabilities in plaintiffs' legal theories.

PLF and its clients attempted another, comparably fundamental obfuscation with respect to the causes of action that plaintiffs purported to bring under equal protection, procedural due process, and taking theories. Given PLF's sophistication and its years of experience in litigation devoted to promoting property rights, it obviously knew that its clients, on the facts alleged, could have no right to relief under any of these constitutional theories unless they had a legally cognizable *property* interest that the governmental action they were challenging invaded. PLF also must have known that it is *state* law that determines what constitutes a "property" interest in these settings. Despite this knowledge, PLF studiously ignored decades old California authorities that had made it very clear that a landowner's desire to gain access to publicly controlled sources of water could *not* be characterized as a "property interest" or an entitlement of any kind. For example, while stating that the act of declaring a water emergency and moratorium on new water service is within the legislative authority of a California water district, the *Swanson* court, citing a California Supreme Court decision from *1921*, pointed out that "a potential water user does not possess any absolute right to be afforded water service and . . . the Constitution does not require that he be treated in the same manner as established users of the water system." *Swanson, supra, citing Butte Co. W. U. Assn. v. Railroad Com.*, 185 Cal. 218, 230 (1921). PLF never brought this fundamental component of California law to the court's attention in this action. Having cited *Swanson* for other

purposes, PLF cannot reasonably contend that this failure was based on ignorance.

It was open to PLF to squarely acknowledge this clearly hostile line of California precedents, then argue, in a straightforward manner, that the 5th and 14th Amendments of the United States Constitution should be construed to prohibit California courts from defining property rights so as to eliminate plaintiffs' causes of action under the equal protection, procedural due process, and just compensation clauses. But PLF made no such straightforward appeal for a change in the law. Instead, they tried to duck the legal bullets. This conduct casts a long credibility shadow over PLF's contention in these proceedings that it refused to alter the basic character of the original complaint, despite Judge Williams' warnings, because it needed to preserve its record for appeal.

Instead of pursuing any of the intellectually honest approaches described above, plaintiffs filed a complaint and an amended complaint in which they purported to set forth many different causes of action, naming more than 20 individual defendants, from whom they sought 30 million dollars in damages. We are compelled to conclude that they deliberately obscured both relevant facts and law in order to sustain the life of this suit long enough to achieve their political and financial goals: to intimidate elected officials into changing political decisions and to raise money for PLF's coffers. Their action constitutes a clear, intentional abuse of the judicial process that compels imposition of sanctions on them.

In the sections that follow, the court describes in greater detail the many bases for its conclusion that Pacific Legal Foundation and the Mesa Ranch plaintiffs prosecuted this entire action in bad faith.

* * *

a. The Constitutional Claims

(1) Takings and Inverse Condemnation Claims

Plaintiffs' could not reasonably assert constitutional claims, including those of takings and unequal treatment, based on the denial of water service because California law has long held that "a potential user does not possess any absolute right to be afforded water service and . . . the Constitution does not require that he be treated in the same manner as established users of the water system." *Swanson, supra* 56 Cal.App.3d at 522, *citing Butte Co. v. W. U. Assn. v. Railroad Com.*, 185 Cal 218, 230 (1921). The BCPUD ordinance at issue here, which "distinguishes between parties does not violate the equal protection or due process clause [because] the distinction rests upon a rational basis, and *it must be presumed to rest upon that basis if there is any conceivable state of facts which would support it.*" *Swanson,supra* at 523, *citing San Jose v. Donohue*, 51 Cal.App.3d 40, 45 (1975) (emphasis added). The facts show clear support for the ordinance based upon the findings both of BCPUD and the California Department of Health Services, which in November 1982 conditioned BCPUD's water permit on the continuation of the moratorium.

Plaintiffs could not reasonably claim inverse condemnation because "in order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury." *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110, 120-21 (1973). *See also Hollister Park Inv. Co. v. Goleta Water Dist.*, 82 Cal.App.3d 290, 293 (1978). In *Hollister Park*, the Court of Appeals affirmed the trial court's dismissal of plaintiff's complaint without leave to amend even though, as a result of the water moratorium prohibiting new water service connections plaintiff's property was " 'rendered unsuitable for development or use for any purpose whatsoever.' " *Id.* at 293. The Court of Appeal applied the *Swanson* holding despite the fact that the "lack of water prevented the landowner from obtaining financing for the property, and it was lost in a foreclosure sale," and despite the claim that the moratorium was enacted in furtherance of a no growth policy. *Id.*

Citing *Swanson* and *Selby*, the Court of Appeal held that the plaintiff had no claim, having founded his "action for inverse condemnation upon a right to be treated in the same fashion as existing users of the district's water"—a right that did not exist. *Id.* at 294. In striking similarity to this case, the court noted that plaintiffs sought "to avoid the inevitable impact of controlling precedent by arguing that in reality the ordinances represent adoption of a 'no growth' policy in the form of a

studied and deliberate plan to avoid acquisition of sufficient water resources to serve new customers of the district." *Id. citing Swanson v. Marin Mun. Water Dist., supra.* In this case, the findings BCPUD relied upon in adopting Resolution 173, as well as the Department of Health Services report, show the strong factual basis for the declaration of a water emergency. Accordingly, as in *Swanson* and *Hollister*, plaintiffs' claims of sham and conspiracy had no merit under well-established California authorities.

Even if plaintiffs had originally made a good faith argument for the modification or reversal of existing law --something they pointedly did not do—they could not reasonably have continued to defend their constitutional claims after the June 30, 1986, decision of the Ninth Circuit that "acknowledged that mere 'potential' water users had no property interest under California law subject to protection under the United States Constitution." *McMillan v. Goleta Water Dist.*, 792 F.2d 1453, 1455 n.2 (1986) *citing McMillan v. Goleta Water Dist.*, 738 F.2d 447 (1984) (memorandum decision). It may be more appropriate to charge PLF with knowledge of the Court of Appeals holding in the 1984 memorandum decision because *McMillan* is one of the cases for which PLF claims participatory credit in its 1985-1986 Annual Report.[23]

In *McMillan*, the Ninth Circuit explained the ruling of the California Court of Appeal in *Hollister Park* to be that the "water moratorium is constitutional *as applied to potential users* of water" in that it was "rationally related

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[23] *See* Harris Decl., filed Feb. 16, 1988, Ex. J, p. 13.

to a legitimate government purpose, i.e. water conservation and development." *Id.* at 1457.

Plaintiffs' pointed avoidance of the substantive and dispositive law at issue in this case, and their muddying of the legal and factual waters, strongly supports the inference that plaintiffs' counsel brought this claim in bad faith.

(2) Due Process and First Amendment Claims

Plaintiffs have continued to press unfounded assertions that BCPUD failed to give them notice (while notably failing to show any such failure). BCPUD supplied the required publication notice for at least the *last* of the reenactments of the water moratorium. Calif.Water Code § 351 et seq. It is not shown by the evidence presented to this court whether the early enactments also were preceded by the statutory notice. But that need not concern the court, because the 1977 moratorium reenactment would be the one affecting, if at all, the interest complained of by plaintiffs in 1982 when they filed the complaint.

Plaintiffs' assertion of due process claims essentially alleging a right to individual notice of BCPUD meetings and hearings was patently frivolous. Procedural due process does not require notice or hearings in regard to legislative actions of a public entity, even when those actions affect one's property. *See Bi-Metallic Investment Co. v. State Board of Equalization,* 239 U.S. 441, 445 (1915) ("Where a rule of government applies to more than a few people, it is impracticable that everyone should have a

direct voice in its adoption."). The Court's rationale has been followed consistently, and no due process rights attach to legislative and quasi-legislative decision-making by state or local entities. *See e.g. Yassini v. Crosland,* 618 F.2d 1356 1363 (9th Cir. 1980) ("Where an agency action is not based on individual grounds, but is a matter of general policy, no hearing is constitutionally required . . . . "). The frivolousness of plaintiffs' due process claims is particularly blatant with respect to the three plaintiffs who had not acquired property rights in Bolinas until many years after the last enactment of the moratorium.

Plaintiffs' First Amendment claims are also meritless because they are merely assertions that the alleged lack of sufficient notice deprived them of their right to express themselves on relevant matters at unnamed meetings and hearings. This argument is patently frivolous as to all such meetings that were not formal hearings of BCPUD, and as to the formal ones, especially those where the moratorium was enacted or reenacted, the argument is duplicitous because although the plaintiffs insist that "it can be reasonably inferred from plaintiffs' complaint that defendants did not comply with these [statutory notice] provisions,"[24] just such notice was provided—and plaintiffs' counsel no doubt knew it. Plaintiffs have documented over four hundred hours of research, they must have obtained, at the very least, a copy of Resolution No. 173 which sets forth the publication complying with Water Code § 352.

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[24] Plaintiffs' Consolidated Opposition Memo to Defendants Motion to Dismiss, filed Nov. 10, 1983, p.23, Dkt. No. 157.

(3) Equal Protection Claims

Given the absence of a protectable property interest, plaintiffs could not, for reasons discussed above, reasonably assert an equal protection argument. Period. *See Swanson, supra* 56 Cal.App.3d at 522, *citing Butte Co. W. U. Assn. v. Railroad Com.*, 185 Cal 218, 230 (1921). *See also Morshead v. California Regional Water Quality Control Bd.*, 45 Cal.App.3d 442, 449-50 (1975).

* * *

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No. 92-1544

In The

Supreme Court of the United States

October Term, 1992

PACIFIC LEGAL FOUNDATION,

Petitioner,

v.

PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX; JACK BOWEN McLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,

Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

MOTION AND BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation (MSLF) respectfully petitions to file the annexed brief *amicus curiae* pursuant to Supreme Court Rule 37. Petitioner has given its

consent to MSLF for the filing of an *amicus* brief. However, Respondents have denied consent. A copy of Petitioner's consent has been provided to the Clerk of the Court.

IDENTITY AND INTERESTS OF AMICUS

Mountain States Legal Foundation is a non-profit, membership, public interest law foundation organized pursuant to the laws of the State of Colorado and dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government, and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state in the country. Large numbers of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in many environmental issues. In addition, MSLF is active on behalf of its members and the public interest in seeking an equitable balance between economic and environmental objectives in the management of the public lands.

The interests of Petitioner and Respondents are with the impact of the decision below on each of them individually. MSLF believes that there are broader public policy concerns which will not be addressed adequately if the arguments set forth herein are not heard by this Honorable Court.

MSLF has participated in numerous cases before this Honorable Court either as an *amicus*, as attorney for one of the parties, or as an intervenor, most recently in *Lujan v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 695 (1990) and *Mountain States Legal Foundation v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 775 (1990).

MSLF's interest in the outcome of this lawsuit is directly tied to its ability to support the public's interest in environmentally sound resource development. MSLF has serious concerns that the Ninth Circuit's decision below will have a particularly chilling effect on cases involving novel legal theories.

WHEREFORE, Mountain States Legal Foundation respectfully requests the permission of this Honorable Court to participate in this case as *amicus curiae* and to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

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April 1993

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BRIEF *AMICUS CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amicus curiae* in support of Pacific Legal Foundation, the Petitioner for *certiorari*.[1]

INTERESTS OF *AMICUS CURIAE*

Mountain States Legal Foundation is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state in the country. Large numbers of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in many environmental issues. In addition, MSLF is active on behalf of its members and the public interest in seeking an equitable balance between economic and environmental objectives in the management of the public lands.

The interests of Petitioner and Respondents are with the impact of the decision below on each of them individually. MSLF believes that there are broader public policy concerns which will not be addressed adequately if the

[1] *Amicus* has obtained the written consent of Petitioner. The written consent of Petitioner has been provided to the Clerk of the Court. Respondents have declined to give consent. In accordance with Supreme Court Rule 37, a Motion for Leave To File Brief *Amicus Curiae* is provided herewith.

arguments set forth herein are not heard by this Honorable Court.

MSLF has participated in numerous cases before this Honorable Court either as an *amicus*, as attorney for one of the parties, or as an intervenor, most recently in *Lujan v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 695 (1990) and *Mountain States Legal Foundation v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 775 (1990).

MSLF's interest in the outcome of this lawsuit is directly tied to its ability to support the public's interest in environmentally sound resource development. MSLF has serious concerns that the Ninth Circuit's decision below will have a particularly chilling effect on cases involving novel legal theories.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amicus curiae, Mountain States Legal Foundation, hereby adopts petitioner's statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case.

SUMMARY OF THE ARGUMENT

The Ninth Circuit Court of Appeals improperly expanded the "inherent power" of Article III Courts to impose fee-shifting sanctions on a non-profit, public interest organization which was not a party to any litigation before the district court. The Ninth Circuit's decision

unduly burdens the ability of public interest organizations to continue the valuable contribution which they make to this Nation's legal system.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Is An Important And Recurring Issue That Demands Resolution By This Court

This is one of the most important and far-reaching cases affecting public interest legal organizations to come out of the Ninth Circuit in years. It is not only deeply disturbing for those organizations with public interest litigation programs similar to that of *amicus*, but to all other public interest organizations.

It seems so fundamental and beyond dispute that public interest attorneys feel compelled to practice law cautiously, knowing full well that their conduct is governed by Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, and ethical rules. However, if this decision is allowed to stand, such caution and precision is useless. A district court will be able to sanction public interest legal foundations instead of any responsible attorney, and thereby deter the activity of organizations which have brought so much to this nation's legal tradition and its respect for individual freedoms.

The opinion by the Ninth Circuit poses a direct financial threat to any non-profit organization that lends support to public interest litigation. The opinion also creates the uncomfortable dilemma for non-profit organizations

and their attorneys in that ethical rules generally prohibit attorneys from allowing third parties (including attorneys' employers, if different from the client) from interfering in the attorney-client relationship.

Thus, the goal sought by our Founding Fathers, free and open legal discourse on issues of public concern, will be thwarted. In light of the exceptional importance of this matter, involving as it does the continued vitality of public interest legal organizations, it is critical that this Honorable Court grant *certiorari*.

B. An Intolerable Conflict Exists Between The Decision Below And Decisions Rendered By This Court.

1. The Decision Below Is In Conflict With The Decisions Of This Court Which Seek To Properly Define The Bounds Of The Inherent Powers Doctrine Of Federal District Courts.

This Court has properly recognized that a court must have certain inherent powers in order to function and maintain its stature. Similarly, this Court has also been extremely careful in defining the scope of these inherent powers. This Court has recognized the dangers present by the misapplication of inherent powers and the significant risk these powers pose not only to litigants, but to our federal system of government.

During this Court's current opportunity to re-evaluate the inherent powers doctrine, the words of Justice Frankfurter, concurring in *Youngstown Sheet and Tube Co.*

v. Sawyer, 343 U.S. 579, 594 (1952), may prove to be a valuable reminder:

> [t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

Thus, this Court and a number of courts of appeals have articulated specific limitations on attempts to expand a federal court's inherent powers.

Recently, in *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123, 2132 (1991), this Court held that a district court may not invoke inherent power absent a determination that the exercise of such power is *necessary* to the court's operation. To ensure adherence to this "rule of necessity," a district court must not invoke its inherent power without first attempting to exhaust whatever powers are available to it under existing statutes or procedural rules. *Chambers* at 2141-42 (Kennedy, J., dissenting); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). The Ninth Circuit transgressed these limitations by permitting the district court to ignore the application of adequate available means to protect its authority.

2. The Decision Below Is In Conflict With The Decisions Of This Court Which Require Exhaustion Of Express Sanctioning Provisions.

The decision of the Ninth Circuit Court of Appeals is directly contrary to this Court's decisions which require

district courts to "exercise the least possible power adequate to the end proposed." *Spallone v. United States*, 493 U.S. 265, 280 (1990) (internal quotations and citations omitted.)

In an attorney sanctioning context, individual justices of this Court have strongly stated that a district court must turn to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 before invoking inherent power. *Chambers*, 111 S.Ct. at 2141 (Kennedy, J., dissenting) and *Id.* at 2141 (Scalia, J., dissenting). These statements appropriately stem from concerns about the proper relationship between the judiciary and the legislative branch.

The "rule of necessity" in the inherent powers doctrine underscores the importance of avoiding unnecessary judicial encroachments upon legitimate Congressional authority. As Justice Kennedy observed in *Chambers*, "the American Rule recognizes that the legislature, not the judiciary, possesses constitutional responsibility for defining sanctions and fees. . . . " *Chambers*, 111 S.Ct. at 2142 (Kennedy, J., dissenting), *see Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *Business Guides, Inc. v. Chromatic Communication Enterprises, Inc.*, 498 U.S. ___, 112 L.Ed.2d 1140, 111 S.Ct. 940 (1991) (Kennedy, J., dissenting); and *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1975).

In the instant case, Congress has expressly made the judgment that attorneys should be held personally liable under Fed. R. Civ. P. 11 when their conduct so warrants. *See Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989). Further, Congress in 28 U.S.C. § 1927

again made the judgment that a district court could sanction, as in the Rule 11 context, any attorney admitted to practice in a federal court for improper behavior which detracts from the power of the court to protect litigants from frivolous claims.

The instant case therefore presents this Court with an opportunity to speak with a united voice concerning the limits of inherent judicial power, a subject which engendered a 5-to-4 split in the recent case of *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123 (1991). The majority in *Chambers* ruled that the scheme of statutes and rules provided by Congress to target bad-faith conduct had not "displace[d] the inherent power to impose sanctions" for such activity. *Id.* at 2134. Although on the facts of the case the majority did not perceive "that the District Court's reliance on the inherent power thwarted the purposes of other sanctioning mechanisms," *Id.* at 2136, the majority reaffirmed that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion," *Id.* at 2132, and that "the exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of Congress.'" *Id.* at 2137.

Justice Kennedy, in dissent, also emphasized that "[i]nherent powers are the exception, not the rule, and their assertion requires special justification in each case," and that the lower federal courts must not be permitted "to ignore express Rules and statutes on point." *Id.* at 2143 (Kennedy, J., joined by Rehnquist, C.J. and Souter, J., dissenting). Justice Scalia also voiced serious concerns, arguing among other things that "Congress may prescribe the means by which the courts may protect the integrity of their proceedings," and that "[a] court must

use the prescribed means unless for some reason they are inadequate." *Id.* at 2140-41 (Scalia, J., dissenting).

The Ninth Circuit has refused to recognize that its power to impose sanctions pursuant to its inherent power has been displaced by enactment of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. Such disrespect provides common ground for the majority and dissenting justices in *Chambers* and presents an important opportunity for this Court to underscore for the lower federal courts the basic axioms regarding the limits of judicial power.

The power of the federal courts "to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959). Congress possesses the authority under the Necessary and Proper Clause "to enact laws carrying into execution the powers vested in other departments of the Federal Government," *Kaiser Aetna v. United States*, 444 U.S. 164, 172 n.7 (1979), including an "undoubted power to regulate the practice and procedure of federal courts." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941).

C. A Direct And Irreconcilable Conflict Exists Between The Decision Below And A Decision Rendered By Another Court Of Appeals.

The Ninth Circuit Court of Appeals opinion imposed sanctions, not on the attorneys who were before the court, but on their non-party employer, a non-profit, public interest organization. In this instance, the Ninth Circuit not only ignored Supreme Court precedent regarding

limitations on inherent power, but has also placed itself in direct conflict with the decision of the Fourth Circuit in *Blue v. Department of the Army*, 914 F.2d 525 (4th Cir. 1990).

In *Blue*, the Fourth Circuit held that district courts have no power to make distributional judgments between the attorneys who committed the alleged misconduct and the organization which financed the litigation. In that case the district court had imposed sanctions against several individual attorneys, one of whom was employed by the National Association for the Advancement of Colored People Legal Defense Fund. The lower court ordered the Legal Defense Fund not to pay any of the sanctions imposed on the attorneys. *Id.* at 549. The Fourth Circuit reversed, ruling that the district court had no power to control the Legal Defense Fund's allocation of its resources.

It is difficult, if not impossible, to ignore the holding of the Fourth Circuit in *Blue*. Yet, that is what the Ninth Circuit Court of Appeals has done. In the instant case, the district court made the very kind of distributional judgment that the Fourth Circuit held was beyond a district court's inherent power. Instead of pursuing sanctions against any attorney alleged to have committed litigation misconduct, the district court required the petitioner, a non-party to the litigation, to bear the financial responsibility of its employee's behavior.

Because the decision of the Ninth Circuit Court of Appeals is in direct conflict with the decision of the Fourth Circuit Court of Appeals, the petition should be granted.

D. The Decision Below Significantly Complicates The Delicate Balance Of Duty A Public-Interest Attorney Owes To The Client And To The Court.

The Ninth Circuit opinion significantly complicates the already complicated relationship among the attorney, the court, and the client. *Amicus* vividly recalls many instances where the multi-faceted duty was placed in conflict, demanding close and ethical scrutiny for proper resolution.

The Ninth Circuit opinion unnecessarily meddles in the attorney-client relationship in litigation funded by non-profit organizations such as *Amicus*. Because any non-party organization financing litigation may now be sanctioned based on the conduct of individual attorneys, *Amicus* would be forced financially to take an active and direct role in the conduct of litigation. This presents a direct and intrusive interference with the attorney-client relationship.

This presents an unfortunate dilemma for non-profit organizations and their attorneys. Ethics rules prohibit attorneys from allowing third parties (including attorneys' employers, if different from the client) from interfering with their professional judgment or otherwise interfering in the attorney-client relationship. In Colorado, for example, Rules 1.7, 1.9 and 1.13 of Colorado's Rules of Professional Conduct prohibit interference with the attorney's professional judgment or independence. The Colorado rules also prohibit participation in an organization furnishing legal services if the organization interferes with the attorney-client relationship. Yet, the Ninth Circuit's opinion effectively forces an organization

to interfere and micro-manage any litigation the organization funds or otherwise supports for fear of exposure to the types of liability at issue in the present case.

E. Public Interest Organizations Have Made Significant Contributions To The Development Of The Law And To The Public Good.

It is difficult to imagine a greater burden placed upon the shoulders of public interest organizations than that placed by the Court below. The Ninth Circuit decision will undoubtedly discourage a great deal of future cases if left undisturbed. The mere prospect of financial liability will deter public interest organizations from supporting litigation at all. Organizations which have in the past contributed so much to the public good by providing financial and logistical support will now be forced to question their involvement.

This Court need not be reminded of the fact that a number of this Court's landmark decisions were spawned by advocacy provided by public interest organizations. *E.g., Brown v. Board of Education*, 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenberg Bd. of Education*, 402 U.S. 1 (1971); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Nollan v. California Coastal Comm'n*, 484 U.S. 825 (1987); *Mountain States Legal Foundation v. National Wildlife Federation*, 497 U.S. ___ (1990). Like many other non-profit organizations, *Amicus* Mountain States Legal Foundation does not charge fees for representation. In fact, MSLF provides attorneys to represent parties who could not otherwise afford to present their claims in court. It would be a sad occasion if justice in this country

now comes only from cases where individuals or organizations could afford to advance their causes.

CONCLUSION

For these reasons, *Amicus* Mountain States Legal Foundation urges this Court to grant this petition for writ of *certiorari*.

Respectfully submitted,

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No. 92-1544

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

PACIFIC LEGAL FOUNDATION,
Petitioner,

VS.

PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX; JACK BOWEN MCCLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITE HARRIS; JUDITH WESTON; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In Propria Persona

Questions Presented

1. Whether the district court, in the exercise of its inherent powers, may impose a limited monetary sanction against the entity (the "public interest law firm") employing all of the attorneys, where the sanctionable matter permeated years of litigation, and where the court expressly found, *inter alia*, that the entity

(a) had "circulated no fewer than eleven attorneys through the case, none appearing or withdrawing by formal leave of court,"

(b) had "actively participated in all phases of the case"

(c) had been "the sponsor of th[e] litigation;"

(d) had represented itself "as counsel" exercising "quality control" in litigation,

(e) had been "one of the intended beneficiaries of the offending conduct," and

(f) where the court further found that "in the circumstances of this case" imposing such inherent powers sanctions directly upon the entity was necessary to the operations of the court.

2. Whether a district court, which found that the imposition of sanctions directly upon the entity employing the attorneys was necessary to the court's operations, has "jurisdiction" over the entity sufficient to sanction it, where, *inter alia*,

(a) the entity was expressly found to have "actively participated in all phases of the [underlying] case;"

(b) the entity's attorney employees signed stipulations filed in court expressly in the name of the entity during the underlying litigation;

(c) the entity's name and logo were prominently displayed on virtually every sheet of paper filed in court by the entity's attorney employees during the underlying litigation;

(d) the entity's out of court statements to a party, to the counsel for other parties, and to the public claimed that the entity had filed the suit; and

(e) the entity appeared and participated in the sanctions proceedings, was expressly represented by counsel for the entity, and the entity's opposition papers filed during 1988 and 1989 did not even contain the word "jurisdiction" and the entity did not raise "jurisdiction" as an objection at any time prior to the Special Master's final liability report in 1990, which expressly confirmed that the entity (and not its clients) should be sanctioned.

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STATEMENT OF THE CASE

1. *Background.* These sanctions arose out of litigation filed by the Pacific Legal Foundation ("PLF") in 1982 against Bolinas Community Public Utility District ("BCPUD"), a small semi-rural district, and against numerous present and former directors and private citizens who had participated in civic affairs. Clerk's Record (hereinafter "CR") 1. The complaint included a plethora of purported antitrust and constitutional claims, which the Court quickly recognized "were supported by little more than overbroad, legally conclusory allegations that fail[ed] to adequately identify their legal or factual bases." *See, e.g.*, C-20-22.[1] The damages sought -- more than $30 million plus attorneys' fees (over 100 times the operating budget of BCPUD) -- were also sought personally from the individual defendants, who were sued in their personal capacities (as well as any official capacity they might have or they might ever have had during a period extending back more than a decade). CR 1; C-17, C-34.

Recognizing early that the mere pendency of the litigation could have a potentially chilling impact on defendants' exercise of their First Amendment rights, the District Court directed that certain information be provided in an amended complaint. C-20-22. Despite the District Court's order, and despite its other warnings and expressions of concern regarding the potentially chilling impact of this type of litigation, the additional information was not provided. C-26.

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[1] Petitioner's Appendix "C". Citations to Petitioner's Appendices "A" through "M" will be in this form, as will citations to Respondent's Appendices "N" through "S" (which are at the end of this opposition).

Instead, the amended complaint expanded the number of vague claims and added still more parties. After reviewing the circumstances of this case, the Special Master concluded during the sanctions proceedings, as did the District Court Judge, that this refusal to comply with the Court's order had been in bad faith.

It was but one of several specific situations involving bad faith litigation conduct where PLF had

> attempted to contort what could have been a relatively straightforward case into a massive, complex, conceptually dense, expensive litigation, and, along the way, persisted in pursuing theories . . . for which there was no credible factual support.

E-9.

2. *Bolinas Community Public Utility District ("BCPUD").* BCPUD is a small public utility district in western Marin County. Formed in 1967, BCPUD operates a water system inherited from two even smaller districts; it provides water services to approximately 580 water meter connections. In 1977 BCPUD enacted a moratorium on water hookups to its systems, which was in effect when this action was filed. (Previous moratorium resolutions, enacted in 1971 and 1973, were repealed in 1977. CR 384, Exh. A.) In 1982 the California Department of Health Services ("DOHS") expressly conditioned BCPUD's operating permit on a continuation of the BCPUD moratorium on new hookups, although BCPUD had made significant improvements to the system. *See* CR 350, Exh. D (DOHS Engineering Rptr., Aug. 1982) ("Due to the limited storage capacity and the many leaks in the aged distribution system, it is not possible for the system to support additional connections at this time."). The DOHS imposed this condition on BCPUD's

operating permit prior to the filing of this litigation. The DOHS condition has been upheld by the state courts in other PLF litigation involving the parties herein, *see Gilbert v. State of California*, 218 Cal. App. 3d 234 (1990), as has the BCPUD moratorium, which the state court found to have been "justified from its inception". *Gilbert et al. v. State of California et al.*, No. 636481-0 (Nov. 22, 1991).[2]

3. *The Individual Respondents*. The nine individual respondents include three current BCPUD board members (Kayfetz, Amoroso and McClellan) and six former board members (Niman, Schell, Harris, Weston, LeMieux and Farnsworth). They were among the more than twenty individual defendants who were sued personally for more than $30 million in this litigation. Several respondents, unable to secure representation, appeared *in propria persona* during parts of the litigation.

4. *Petitioner Pacific Legal Foundation ("PLF")*. PLF generally describes itself to the federal and state governments, the legal community and the public as a "public

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[2] The final state court decision upholding the BCPUD moratorium concluded that (a) "there is a solid factual basis for declaring a water shortage emergency" and (b) "the moratorium has been justified from its inception to the present based upon realistic concerns . . . about the capacity of the District's water system to meet conservative demands in times of continuing drought, particularly given the marginal capacity not only of the storage system, but the delivery system, as well." R-1-4. Ignoring the final, binding decision about the moratorium, the petition points to an earlier preliminary decision of the Ninth Circuit which reversed part of an earlier summary judgment as to certain claims, *none of which affected the bases of the District Court's sanctions*. Moreover, the Ninth Circuit's decision "at this preliminary stage" reflected an express preference for "[r]esolution by plenary hearing rather than by summary judgment . . . [in] claims for regulatory taking." H-8-9.

interest law firm." *See, e.g.*, C-35; O-3-7, 10; *and* CR 537, Exhs. A, B, D. It claims to be the largest law firm of its type in the country. O-3-7, 10; CR 500, Exhs. I, J; see also Q-3, ¶2 (PLF revenues during this litigation). The PLF's President, CEO and Board Member (and the senior PLF attorney in this litigation) has said of this case: "The PLF filed suit" against BCPUD. The case was "brought by the PLF." It was "[o]ne of the most significant PLF law suits." "This case will be an extremely important one for PLF." C-33-34. It was, he said, "The case we have been waiting for." O-6-7; CR 536, Exh. C. The District Court found that "PLF has circulated no fewer than eleven attorneys through this case." C-34. The PLF's CEO was also joined on this case by the PLF's Deputy Director and a PLF Section Chief. *See* CR 500, Exhs. G, I, J; CR 1 & CR 168; CR 249; *and* CR 607, Tab 40. "Plaintiffs have been represented throughout this action only by PLF attorneys." C-34, ¶39. "PLF was . . . actively involved in all phases of the case." C-33. ¶36.

5. *PLF's Clients.*[3] PLF's clients in this litigation were real estate developers, Anton Holter and Mesa Ranch (his partnership) and the Lockarys, Gilberts and Macey. Holter/Mesa Ranch owned 210 acres. All was outside BCPUD boundaries, except one acre with a water meter. Contrary to the petition's suggestion (Pet 3), Holter/Mesa Ranch were <u>not</u> seeking a water hookup; Holter already had one and was receiving water from BCPUD. *See* C-14-15, ¶ 5. The other plaintiffs owned small, unimproved lots within BCPUD's boundaries without water meters. The Lockarys and Macey bought their land just before the litigation with

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[3] The PLF refers to a person represented by PLF attorneys as a "client" of the entity. C-35, ¶ 40.

full awareness of the existing moratorium. C-14, & C-26.[4]

6. *The Sanctions Proceedings.* BCPUD and the individual defendants filed motions for sanctions and attorneys' fees in February 1988. CR 472, CR 480-503. The District Court Judge directed that the motion be referred initially to a special master. CR 528. United States Magistrate Judge Wayne D. Brazil, an agreed-upon candidate, acted as Special Master. CR 543.

Additional briefing of sanctions issues for the Special Master was completed in early March 1989. At a conference on March 14, 1989, the Special Master noted shortcomings in the responses and submissions of PLF and the plaintiffs; he then provided them yet another opportunity to file papers. Leaving the choice up to them, he also offered the opportunity to present testimony through affidavits, or live at an evidentiary hearing (an option they declined). At the March 14 conference, the Special Master prompted *sua sponte* a special discussion of the First Amendment. He also provided a separate briefing opportunity to address specifically "what, if any, significance arises in the context of these proceedings due to the nature of PLF as a non-profit, public interest law firm." CR 599, ¶ 4. PLF filed a brief on this issue (CR 616), to which defendants responded. CR 631-32.

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[4] Contrary to the petition's suggestion (Pet 2), plaintiffs were not simply "parties who could not otherwise afford to present their claims in court." The developer plaintiffs (Holter/Mesa Ranch) used private counsel when suing the United States, an adversary far more formidable than tiny BCPUD, in contemporaneous litigation for taking the same property. *See, e.g.*, 222 Ct. Cl. 623 (1980) & 2 Cl. Ct. 700 (1983).

A draft recommendation was filed by the Special Master in early September 1989. CR 634. After receiving comments from BCPUD, PLF and Holter/Mesa Ranch, the Special Master filed a Report and Recommendation re: Liability Aspects of Defendants Motions for Sanctions on January 11, 1990. C-1-106. The 103-page report contained detailed findings, including multiple findings of bad faith, as well as a finding that PLF had "abundant" notice of the sanctions risk from the beginning, that PLF had "actively participated in all aspects of the case," and that "in every meaningful sense of the word, PLF shared responsibility for the bad faith actions." The report also found that the District Court needed and possessed the inherent powers authority to sanction the PLF itself, and, with respect to certain identified matters, but not others, it recommended that sanctions be imposed on the PLF.

PLF filed objections on January 29. CR 648. A review followed by the District Court Judge, who had handled the underlying action since its filing in 1982. On April 2, the Court adopted the findings of fact and conclusions of law and accepted the recommendations in the Special Master's report. S-1-2. The Court additionally found that the "circumstances of this case clearly support" the imposition of monetary sanctions on PLF.

Following the District Court's April 2 order, the Special Master conducted further proceedings to determine the amount of the sanctions. On January 28, 1991, the Special Master issued his Recommendation re Character and Magnitude of Sanctions. E-1-105. The report further addressed considerations that shaped the sanctions recommendation, general mechanics of the calculations, and

specific calculations for each defendant. Id.[5] PLF filed objections. CR 741. On February 11, 1991 the District Court adopted the Special Master's recommendations and awarded the sanctions. CR 743. On September 9, 1992, the Ninth Circuit affirmed in part and reversed in part the sanctions award. A-1-32.

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[5] The Special Master's January 11, 1990, report had also recommended additional show cause proceedings with respect to potential personal liability of certain individual PLF attorneys for sanctions, and the District Court's April 2 order accepted the recommendation. Pursuant to the briefing schedule established at the June 21 conference, briefs for the individual PLF attorneys were filed on July 23 (CR 671 & CR 674), with responses and replies on August 17 (CR 688-89 & CR 692-93) and August 30 and 31 (CR 694-702). On October 22, the Special Master recommended that the proceedings regarding the amount of the PLF sanctions continue but that those regarding personal sanctions awards be terminated. CR 710. Despite believing that he could proceed with "an open, persuadable mind" in considering personal sanctions awards against individual PLF attorneys, the Special Master observed that the way the findings had been articulated in the January 1990 liability report might suggest otherwise. The Court accepted the Special Master's recommendation, noting expressly that (i) "the expenditure of time and effort to further adjudicate these issues is not outweighed by any benefit that might accrue from the continued adjudication" (ii) *the proceedings may already "have given counsel an opportunity to reflect upon their conduct in this case" which "may be helpful to counsel in their future practice"* and (iii) the Special Master was to be commended "for the thorough and fair assessment of the sanctions issues." CR 711 (emphasis supplied).

I. The Petition's First Question Is Not Raised By The Decisions Below: Imposing Sanctions Directly On The PLF Was Expressly Found To Be Necessary Under The Particular Circumstances Of This Case

The Petition notes that inherent power sanctions may not be imposed "absent a determination that the exercise of such power is necessary to the courts' operation" (Pet 8) but then states, inaccurately, that no court here found that the imposition of sanctions was "necessary to protect the district court's authority." Pet 11.

The District Court herein was keenly aware of the care, caution and restraint appropriate to the exercise of its inherent powers. *See, e.g.*, C-36-38; E-2-12; *see also* CR 634 at 60-62. Sanctions were imposed only after a District Court Judge, intimately familiar with the litigation since its filing in 1982, and an agreed-upon Special Master, previously unfamiliar with the litigation, *each* found that sanctions were appropriate and that imposing those sanctions upon the PLF was both appropriate and necessary under the particular circumstances of this litigation.[6]

Necessity was directly addressed and ruled on by the District Court. For example, the court found:

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[6] The PLF "appeared before the district court to defend against the sanctions motions" (Pet 13) and had a full opportunity to respond to them. *See, e.g.*, CR 599 (Special Master *sua sponte* (a) provided PLF and others a third opportunity to submit additional evidence in response to sanctions motions, (b) requested briefing whether PLF's status as public interest law firm raised any special First Amendment issues, and (c) provided the PLF an opportunity to review and comment on an initial draft report.)

In the circumstances of this case, which we describe in detail *infra*, we feel that the District Court **must have** the authority to impose sanctions on PLF itself if the Court is **to be able to protect itself from misuse**, to **protect the interests of litigants** who proceed in good faith, and to **protect the viability of the rules of procedure** that Congress and the Supreme Court have adopted. In every meaningful sense of the word, PLF shared responsibility for the bad faith actions that we describe below. As we show in subsequent sections, PLF was the source, the sponsor, and one of the intended beneficiaries of the offending conduct. There is no reason to believe that PLF did not know how this litigation was being handled, or that PLF was a mere passive and abstract institutional backdrop against which an individual attorney acted independently. Instead, PLF's principal officers formally associated themselves with and publicly claimed credit for the pleadings and other papers that we have concluded were filed in bad faith. Moreover, **because PLF circulated at least 11 different attorneys through this case** (without ever seeking permission for any attorney to join or to withdraw as counsel of record), **it would be impossible for the District Court to meaningfully enforce the norms** that Congress and the Supreme Court have established **if the Court could not impose liability for offending those norms on PLF itself.** These norms carry **a promise of procedural fairness that the courts could not fulfill if they could not impose sanctions on an entity like PLF in circumstances like those** described in the pages that follow. Thus we recommend that, relying on its inherent authority, the Court impose sanctions on PLF.

C-8-9 (Emphasis supplied.); *see* S-1-2 (District Court adoption of findings). These findings of necessity were well-supported by the record.[7]

Moreover, Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") and 28 U.S.C. § 1927 ("Section 1927"), to the extent applicable to the individual PLF attorneys, were expressly considered, and proceedings were undertaken to employ them. *See, e.g.*, C-9-10, C-105-106, E-1-2. Considerations of overall fairness, not lack of culpability, resulted in those proceedings terminating without individual monetary sanctions awards. *See, e.g.*, F-1-2 & note 5, *supra; see also* A-9, n1. Although that process did not result in monetary sanctions being imposed separately on individual PLF attorneys, the PLF has no cause to complain.[8] Under the particular circumstances of this

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[7] *See e.g.* C-60-61 & n.25 (an example of bad faith conduct extending "throughout the course of this litigation"; six attorneys identified on the papers; "difficult .. to point to the specific PLF attorneys responsible"), C-92-95 (continued impact of "no meaningful effort to comply with Judge Williams' order") & F-1-2 (district court order: sanctions proceedings attempting to allocate responsibility among individual PLF attorneys terminated; "continuation ... may harm individual attorneys not at fault, and the expenditure of time and effort to further adjudicate these issues is not outweighed by any benefit that might accrue from the continued adjudication"; "past process ... [has] given counsel an opportunity to reflect upon their conduct in this case and highlighted improper behavior ... and may be helpful to counsel in their future practice"; "PLF sanctions proceedings not terminated.")

[8] Significantly, PLF did not object at any time to termination of the sanctions proceedings against the individual PLF attorney employees, and it did not appeal the District Court's decision to terminate those proceedings. *See* note 5, *sopra*. If anyone had cause to complain, it would have been the defendants. *See, e.g.*, A-9, n1.

litigation, Rule 11 and Section 1927 were found to be inadequate to protect the Court "from misuse," "the interests of litigants" and "the viability of the rules of procedure." Fulfilling the "promise of procedural fairness" required use of the court's inherent powers.

The petition's first question assumes "*the absence* of any determination" that invocation of the court's inherent powers was necessary. Such a determination was made. Thus, the first question is not presented, and the petition should be denied.

II. There Is No Conflict Between The Fourth Circuit's Decision In *Blue* And The Decision Herein.

The petition claims that the decision herein is in "conflict with the decision of the Fourth Circuit in *Blue v. Department of the Army*, 914 F.2d 525 (4th Cir. 1990)." Pet 12. In attempting to manufacture a conflict, the petition has ignored both the facts of *Blue* and the facts herein. No such conflict exists, as a brief comparison of the two cases readily confirms. For example:

Moreover, as the corporate employer, PLF remained free to explore indemnification, if indemnification was appropriate. *See, e.g.*, Cal. Labor Code §§ 2802, 2865, Cal. Corp. Code § 5238. *See, also, Continued Casualty Co. v. Phoenix Construction Co.*, 46 Cal. 2d 423, 428 296 P. 2d 801 (1956) (An employer who has been held liable for the unauthorized negligent act of his employee may recoup his loss in an action against the employee), *and* Restatement (Second) of Torts § 886B, p. 344 (1977). The PLF's current objections are simply another attempt to secure practical immunity for the sanctionable conduct.

1. *Unlike Blue, no preclusive order was entered herein.* In *Blue*, the District Court's sanctions order prohibited the NAACP Legal Defense Fund (LDF) from paying the sanctions imposed on an attorney. The order there was clearly *preclusive*. No preclusive order was entered herein; the sanctions were imposed on the entity without any effort to restrict its financial sources or to preclude internal allocations of responsibility within the organization. Moreover, the record below demonstrates appropriate sensitivity to such issues. *See, e.g.*, CR 565 (BCPUD suggested that, if desired by PLF, any sanctions order could expressly preserve any rights to contribution that PLF might have.). The absence of a preclusive order is but one fatal flaw in the claimed conflict.

2. *Unlike Blue, the sanctionable actions herein occurred while the attorneys were employed by the PLF acting as employees of the PLF.* The situation was very different in *Blue*. One of the attorneys sanctioned (Chambers) happened to be employed by LDF *when the sanctions were imposed*, and he was sanctioned for conduct *unrelated* to his LDF employment. The sanctionable conduct was related to his private law practice. *See Blue, supra* at 531-32.[9] In *Blue* the sanctionable litigation had been

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[9] The pre-filing investigation by Chambers' private law firm began in the spring of 1980. The action was filed in September 1981. The junior associate, Sumter, joined the law firm in January 1983, and trial began January 1984. With Sumter acting as counsel, Blue abandoned numerous claims. The U.S. Army moved for sanctions regarding the "abandoned claims," and the "remainder of Blue's claims went to trial in April 1984." In 1987 the court "awarded sanctions based on the abandoned claims". The "claims which Blue ... had dropped were frivolous, ... both plaintiffs and their counsel had either entered into or maintained the baseless litigation in bad faith." The sanctions for the bad faith pursuit of the frivolous claims, which were dropped in April 1984, were unrelated to LDF, because,

investigated, filed and handled by attorneys at the private law firm acting as such, and Chambers was sanctioned in his private law firm role. *Id.* at 546 ("as an experienced senior partner in charge of the case from its outset"). The PLF's relationship herein stands in sharp contrast to the LDF's in *Blue*. "PLF circulated no fewer than eleven attorneys through this case," and the plaintiffs were "represented throughout ... only by PLF attorneys." C-34, ¶ 39.

3. *Unlike Blue, the PLF sponsored and financed the litigation herein and did so from the outset.* Nothing in *Blue* supports the petition's suggestion that the LDF "financed the litigation" (*see* Pet 12) or that the Fourth Circuit's opinion creates a conflict over a district court's "authority to make distributional judgments as between attorneys and non-parties who fund their litigation activities." Pet 13. In addition to there being no such preclusive order here, the precluded entity in *Blue* had not financed the litigation in which the sanctionable conduct occurred. Sanctions must be adapted to the circumstances of the case. *Blue* and *PLF* are materially different. Here, PLF was the "sponsor of the litigation," "was actively involved in all phases of the case," and represented that it "exercises 'quality control' in litigation." Its president, the senior PLF attorney on the case, asserted not only that "[t]he PLF filed suit," but also that this "PLF suit ...[would be] an extremely important one for PLF". *See* C-33-35.

No conflict exists between the decision herein and the Fourth Circuit's decision in *Blue*. If anything, *Blue* provides additional support for denying the petition. *See III.7.*

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inter alia, it was not until "July 1984" that Chambers assumed his position at LDF. *Id.* at 532.

III. The Imposition of Sanctions On The PLF Was Neither Novel, Unprecedented, Nor Inappropriate.

During sanctions proceedings, the PLF itself appeared, was represented by counsel and enjoyed multiple opportunities to present evidence after knowing that defendants had requested that, *inter alia*, sanctions should be imposed on the PLF itself. The factual findings adopted by the District Court by its April 2, 1990, order included: (i) PLF circulated eleven attorneys through the case (C-9); (ii) "deliberate" bad faith conduct "extended throughout the course of the litigation" including instances where more than half the PLF attorneys were involved (C-60 & C-56-61); (iii) PLF was "the source, sponsor and one of the intended beneficiaries of the offending conduct" (C-8); (iv) PLF shared responsibility "in every meaningful sense of the word," (C-8) and (v) express findings of necessity that, under the circumstances of this case, the District Court "must have the authority to impose sanctions on the PLF itself" to protect the "court from misuse," to protect the "viability of the rules of procedures," and to "protect litigants who proceed in good faith". C-8.

These factual findings, and the extensive record supporting them, show that imposing sanctions upon the PLF itself was appropriate under the circumstances of this litigation. It is important, however, to appreciate that holding such an entity responsible for the acts of its employees is not novel, and the decision to do so presents no new policy issue or significant question requiring this Court's attention.

1. *California charitable corporations are regularly held responsible for the acts of their employees.* PLF is a California non-profit corporation. Such organizations are regularly held accountable for the misconduct of the entity

and of the entity's employees or other agents. PLF has no reasonable basis for expecting the sanctions immunity which it continues to seek.[10]

2. *Congress has expressly recognized the propriety and wisdom of imposing sanctions directly upon a pro bono legal services organization.* The petition suggests that holding the PLF responsible is both novel and bad policy. It is not, as Congress itself has already recognized. *See, e.g.*, 42 U.S.C. § 2996e (f) (Legal Services Corporation: Costs

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[10] *See, e.g., Malloy v. Fong*, 37 Cal.2d 356, 232 P.2d 241, 247 (1951) ("'The incorporated charity should respond to private individuals, business corporations and others, when it does good in a wrong way.'"); *Rice v. California Lutheran Hospital*, 27 Cal. 2d 296, 163 P.2d 860 (1945) (non-profit hospital liable for professional employee's negligence); *Miller v. International Church*, 225 Cal. App. 2d 243, 37 Cal. Rptr. 309 (1964) (church held liable for negligence of minister); *Vind v. Asamblea Apostolica De La Fe En Christo Jesus*, 148 Cal. App. 2d 597, 307 P.2d 85 (1957) (church liable for employee's negligence); *Phoenix Assur. Co. v. Salvation Army*, 83 Cal. App. 455, 461-62 256 P. 1106 (1927) (rejected immunity because it would cause "the agents of charitable institutions to render less than due care"); *Valentine v. La Societe Francaise De Bienfaisance Mutuelle De Los Angeles*, 76 Cal. App. 2d 1, 172 P.2d 359 (1946) (hospital liable for employees' negligence); *see also Allard v. Church of Scientology*, 58 Cal. App. 3d 439, 129 Cal.Rptr. 797 (1976) (church liable for both punitive damages and compensatory damages caused by church employee's statements; "egregious case of malicious prosecution subjects the judicial system itself to abuse, thereby interfering with the constitutional rights of all litigants") and *Silva v. Providence Hospital of Oakland*, 14 Cal. 2d 762, 97 P.2d 798 (1939) ("To require an injured individual to forego compensation for harm when he is otherwise entitled thereto, because the injury was committed by the servants of a charity, is to require him to make an unreasonable contribution to the charity, against his will, and a rule of law imposing such burdens cannot be regarded as socially desirable nor consistent with sound policy").

and fees imposed in action commenced or pursued for harassment purpose or involving abuse of legal process "shall be paid by the Corporation.") California has also recognized that holding charitable corporations responsible financially is good public policy. *See, e.g., supra,* note 10.

3. *The Federal tax exemption policy regarding tax-exempt law firms like PLF neither condones nor immunizes abusive litigation tactics.* In both courts below, the PLF asserted its tax-exempt status as if it somehow should confer upon the PLF some immunity from court-awarded sanctions. It does not. If anything, the PLF's tax-exempt status imposes upon it additional obligations to ensure that litigation abuse does not occur. *See, e.g.*, Rev. Proc. 71-39, 1971 C.B. 565 (Requirement: The organization does not attempt to achieve its objectives through a program of disruption of the judicial system, illegal activity, or violation of the applicable canons of ethics.)

4. *PLF itself, not the individual PLF attorneys, would have received any attorneys' fees awarded in this litigation.* This litigation was authorized by the PLF. The complaints expressly sought attorneys' fees. *See, e.g.*, CR 1, (complaint sought statutorily authorized attorneys' fees.). The attorneys' fees, however, could not properly have gone to the individual attorneys. *See* Rev. Proc. 75-13, 1975 C.B. 662 (attorneys' fees received by public interest law firms go "to the organization rather than to individual staff attorneys."); *see also* CR 500 (IRS Form 990, Part IV, schedule 7: PLF's receipt of "court-awarded attorneys' fees"). Since the PLF was the potential beneficiary of any attorneys' fees awarded, equity also supports imposition on the PLF of the modest sanction which partially reimbursed defendants for some of the additional attorneys' fee burdens caused by the sanctionable conduct.

5. *The imposition of sanctions upon a tax-exempt public interest law firm has already been reviewed and approved by the Eleventh Circuit.* The Ninth Circuit's decision approving the imposition of sanctions upon the PLF was not the first circuit court to approve a sanctions award against a tax-exempt, public interest law firm. *See* A-14 ("We agree with the Eleventh Circuit that '[s]tatus as a public interest law firm or the nature of a claim does not confer immunity from attorneys' fees for bringing and maintaining frivolous lawsuits.") In *Avirgan v. Hull,* 932 F.2d 1572, 1582-83 (11th Cir. 1991), *cert. denied,* 112 S.Ct. 913 (1992) a sanction of more than $1 million was affirmed. The sanction herein was modest and only a small fraction of PLF revenues. *See also* Q-3 (PLF revenues exceeded $25 million from the filing of the complaint to sanctions determination) & CR 500, Exh. A; N-3 (BCPUD's entire annual operating budget when sued herein for $30 million was approximately $280 thousand).

6. *The sanctions herein do not require any impermissible "interference."* The petition's "interference" point is a red herring. First, the PLF has long touted itself as exercising "'quality control' in litigation." C-35, ¶40 (finding); C-61 ("self professed 'quality control' monitor over the litigation"); *see also* CR 676, ¶¶ 9-11. Second, no evidence offered by the PLF even suggested that the PLF's management wanted the PLF attorney employees to behave differently but were afraid to "interfere." Third, the PLF management had actual control all along, so no "interference" was needed. Throughout the litigation, the PLF's CEO, a PLF Board Member, was the senior attorney of record, aided herein by the PLF's Deputy Director and a

PLF Section Chief.[11] Fourth, as Congress expressly recognized, prohibiting inappropriate interference need not prevent ensuring professionalism of the highest degree.[12]

7. *The sanctions herein do not threaten any legitimate public interest litigation activity.* Contrary to the petition's suggestion, the decision herein will not cause the decline of public interest litigation. Pet 18. First, public interest litigation does not require immunity from sanctions for bad faith litigation conduct. *See, e.g, Blue v. Department of the Army,* 914 F.2d 525 (4th Cir. 1990) (Sanctions affirmed; distinguished civil rights attorney held responsible for conduct of subordinates: "The authority which the federal courts possess, an authority often summoned to the side of racial justice is ... built upon respect for the judicial process. That authority cannot, in the long run, be effectively invoked on behalf of civil rights enforcement if civil rights litigants could themselves disregard it with impunity.") Second, the decisions herein reflect consideration and sensitivity towards public interest litigation, further demonstrating the judicial caution and restraint employed here, as well as the absence

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[11] *See*, e.g., Appellees' Brief on Appeal, p.23 n15 (linking names to PLF reports identifying management positions); CR 500, Exh. G, I & J; C-18-19, & CR 607, Tab 40 (state court litigation harassing BCPUD; another PLF Section Chief at trial level where state court found case "clearly frivolous," "brought to harass the District" and "for an improper motive"; PLF CEO and PLF Deputy Director were also on the meritless appeal for which the appellate court awarded additional fees).

[12] *See, e.g.*, 42 U.S.C. § 2996e (h)(3) (Legal Services Corporation: "ensur[ing]" compliance with professional responsibilities and not "interfer[ing] with carrying out professional responsibilities both mandated in same section)

of any threat. The district court itself observed herein:

> "No litigant should be penalized for a good faith, straightforward effort to extend, modify, or reverse the course of the law. Reasonable people may disagree about what the law is or ought to be, and it is imperative to the vitality of our democracy that individuals be afforded fair opportunities to try to persuade those who fix the terms of the law to change them. If PLF had engaged in a straightforward effort to change the law, there would be no occasion for these sanctions proceedings. That is not the course, however, that PLF chose to pursue."

E-8-9; *see also* -1 & DA-14.

8. *The sanctions award is fully compatible with the First Amendment.* In the courts below, the PLF also tried to avoid responsibility by claiming that it had some type of First Amendment immunity from sanctions. Although PLF has abandoned that argument, the petition closes by citing the same two cases on which it had relied, *NAACP v. Button*, 371 U.S. 415, 431 (1962) and *In re Primus*, 436 U.S. 412, 428 (1978), neither of which supported immunity from sanctions for litigation misconduct. *See* A-14 (Ninth Circuit: Cases cited by PLF do not support the "PLF's position that abuse of the court system is constitutionally protected when a public interest law organization is the perpetrator."); *see also* Appellee's Brief on Appeal, p.33, n.26; *cf Cohen v. Cowles Media*, 111 S.Ct. 2513, 2518 (1991) ("generally applicable laws do not offend the First Amendment simply because their enforcement against the press has some incidental effects on its ability to gather and report the news"; "'publisher of a newspaper has no special immunity from the application of the general laws. He has no special privilege to invade the rights and liberties of others.'").

9. *Numerous traditional common law principles support the District Court's decision, which further illustrates the absence of any novel question requiring this Court's attention.* The PLF is a corporation and, as such, can only act through its agents. Even without the District Court's express findings of responsibility and of active participation, traditional principles of agency would adequately support the District Court's decision. Here, the senior attorney was the PLF's CEO, and the PLF's Deputy Director was also involved. Here, the PLF paid the "improper motive" and "harassment" sanctions for other litigation against BCPUD which had been supervised by a PLF Section Chief and, following the sanctions award, promoted him to PLF Director of Litigation. *See, supra,* note 11 and *compare* CR 500, Exh. I *with* CR 500, Exh. J. Both actual authority and apparent authority were reasonable inferences.[13] In addition to the principles of actual authority, apparent authority, and estoppel,[14] there is the doctrine of "inherent agency power" which is power derived "solely from the agency relation and exists for the protection of persons harmed by or dealing with

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[13] See, e.g., *Restatement of Agency (Second)*, § 7, p. 28 (1958) ("Actual Authority"), Comment b ("agent's conduct is authorized if he is reasonable in drawing an inference that the principle intended him so to act although that was not the principle's intent"); Comment c ("most authority is created by implication"); & § 8, p. 30 ("Apparent Authority"), Comment a ("manifestation of the principle . . . or by continuously employing the agent"), Comment c ("to the extent that it is reasonable to believe that the agent is authorized").

[14] PLF attorneys signed in the PLF's name; the PLF told everyone that it was a "law firm"; and one PLF attorney making an application in the PLF's name wrote BCPUD that "PLF is the attorney for the plaintiffs in Lockary". *See* O-8-10; P-4; Q-4-14.

a servant or other agent."[15]

10. *Agency issues involving non-profit entities do not require this Court's attention because they involve "settled rules" which have already been adequately addressed in previous decisions.* The responsibility of non-profit organizations for the acts of their employees acting under colorable authority is not a new question. *See, e.g., Claiborne v. NAACP*, 458 U.S. 886, 930 (1982) ("The NAACP -- like any other organization -- *of course may be held responsible for the acts of its agents* throughout the country that are undertaken within the scope of their actual or apparent authority.") (emphasis supplied) and *Hydrolevel v. American Society of Engineers*, 456 U.S. 556, 565-70 (1982) ("The apparent authority theory *has long been the settled rule* in the federal system." "In a wide variety of areas, the federal courts . . . have imposed liability upon principals for the misdeeds of agents acting with general authority." Non-profit corporation held liable for act of employee writing on corporation's stationery) (emphasis supplied).

Imposing sanctions upon the PLF itself under the circumstances of this particular case was neither novel, unprecedented nor inappropriate. Numerous separate, sufficient and independent bases exist to support the District Court's decision and the Ninth Circuit's affirmance. The petition should be denied.

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[15] See, e.g., *Restatement of Agency (Second)*, § 8A, p. 36 (1958) ("Inherent Agency Power"), Comment a (power based "neither upon consent nor upon . . . manifestations" is applicable to numerous situations including where "agent does something similar to what he is authorized to do, but in violation of orders," where "an agent acts purely for his own purposes," and where an agent "departs from the authorized method.")

IV. The Petition's Second Question Is Not Raised By The Decisions Below: The PLF Appeared, Did Not Contest "*In Personam* Jurisdiction" From The Outset, And Was Not Outside The Court's Reach.

The petition's second question assumes that the District Court did not have "*in personam* jurisdiction" over the PLF. Pet i. The question is not presented by the petition or the record, and the petition should be denied.

1. *The District Court expressly found that PLF had participated in the underlying litigation.* The District Court found that the PLF had been "actively involved in all phases of the case" (C-33, ¶ 36), and had been "on notice from the beginning" that defendants were likely to seek sanctions. C-32, ¶ 34; *see also* C-106 ("PLF has had abundant notice that sanctions were possible"). The PLF's own public statements regarding the litigation asserted that it had "actively participated" in the underlying litigation. C-34, ¶ 38. Early in the case, a PLF attorney repeatedly signed papers filed in the litigation in the PLF's name. *See* 0-7-9, noting examples at CR-5, CR-6, CR-9, CR-15, CR-17, & CR-18. A government records act application expressly in the PLF's name (*see* CR 604, ¶ 6 & Exh. B) was made to help circumvent the court's discovery stay order. C-18. Another PLF attorney wrote on PLF letterhead to BCPUD stating openly that: "PLF is the attorney for plaintiffs in Lockary." *Id.*, ¶4 & Exh. A. The PLF's CEO, counsel of record in the underlying litigation, also repeatedly referred to the case as one that "PLF filed." C-33-34. "Virtually every page of every pleading filed by plaintiffs ... has been on paper imprinted with the PLF logo, name, address, and telephone number." C-35, ¶ 39. That same PLF logo is used by the PLF to represent itself as a "public interest law firm." *See* CR 500, Exh. J *and* O-10 (logo and PLF's

description). Moreover, the underlying litigation sought attorneys' fees under federal statutes, and any such fee recovery would have gone "to the [PLF] organization rather than to individual [PLF] staff attorneys." *See* Rev. Proc. 75-13, 1975 C.B. 662. Under these circumstances, the PLF cannot reasonably be said to be the stranger to the underlying proceedings that its petition tries to portray.[16]

2. *The Ninth Circuit expressly affirmed the findings regarding the PLF's participation in the underlying litigation.* The Ninth Circuit said:

> PLF also takes issue with the district court's factual finding that it was responsible for the sanctionable conduct. PLF contends that it merely provided logistical support to the individual attorneys who represented the plaintiffs, and did not participate as an entity in any way in this suit. The record belies this assertion. While the PLF attorneys did not identify themselves as PLF employees in the signature block of the motions and pleadings, the heading of each court paper they filed listed the attorneys' names, followed by the name and address of PLF. Moreover, the plaintiffs were represented by a constantly changing cast of PLF attorneys, including PLF's president. PLF funded the litigation in its entirety. In its analysis of PLF's involvement, the district court relied on statements by PLF's president

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[16] The record is also replete with PLF's official publications and filings with the government that describe itself as a "public interest law firm." *See, e.g.*, O-3-8 *and* Q-4-14. Although the Ninth Circuit was willing to accept the PLF's protestations that it was not really a "law firm," it also concluded that PLF had actively participated in the underlying litigation. A-12.

> vaunting the importance of the Bolinas suit for PLF, and placing the case in the context of other, similar suits by PLF. The district court found that PLF was not "a mere passive and abstract institutional backdrop", but was, rather, "the sponsor of this litigation, and was actively involved in all phases of the case." We agree.

A-12.[17]

3. *The PLF also appeared and participated in the sanctions proceedings without raising or preserving an "in personam jurisdiction" objection.* The petition concedes, as it must, that the PLF "appeared before the District Court to defend against the sanctions motions". Pet 13. Did it attempt to file a "special" appearance? No. *See, e.g.*, CR 506 (first paper signed by attorney who separately appeared for PLF in sanctions hearing), & CR 510 (PLF's first

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[17] The quoted portion of the Ninth Circuit's opinion deals with the findings actually made by the District Court. It clearly states its agreement with the District Court's findings of actual participation, sponsorship and responsibility. Contrary to this clear affirmance, the petition dwells on the Ninth Circuit's incidental observations regarding post-remand events subsequent to the sanctions ruling, points on which the District Court did not rely and could not have relied, and other later events involving claims for which the PLF was not sanctioned. *See* BCPUD Opposition to PLF's Petition for Rehearing, p. 5-7. From these irrelevancies, however, the petition tries to suggest that the Ninth Circuit rejected the District Court's findings and "found" its own facts on which it affirmed. While the Ninth Circuit may not have thought it necessary to characterize the PLF as a"law firm," something the PLF itself had been doing for decades, it clearly agreed with the District Court that the PLF was "actively involved in all phases of the case" and was the entity "directly responsible for the sanctioned misconduct." A-11-13 & n.2.

opposition brief.)[18] Did it promptly raise an objection in terms of "*in personam* jurisdiction" or "personal jurisdiction" in the first paper filed? No. Did it do so in the second or third paper? No. *See* CR 510 & CR 585. The petition asserts, inaccurately, that when the PLF filed CR 510 (April 1988) and CR 585 (February 1989), it "opposed the sanctions motions, arguing, among other things that the district court lacked *in personam* jurisdiction over petitioner." Pet 3-4. The PLF's opposition papers, however, do not even contain the word "jurisdiction," let alone the expressions *in personam* jurisdiction" or "personal jurisdiction." In fact, the PLF did not express an objection to "*in personam* jurisdiction" while participating for nearly two years in the sanctions proceedings during 1988-1989.

Moreover, when the District Court indicated that it was going to refer the sanctions motions to a special master, the PLF participated in the process of nominating and recommending the agreed-upon candidates. *See* CR 528 & CR 543 (request for nominations; agreed nominations letter & referral order). The criticism (Pet 4) that the "district court ignored petitioner's jurisdictional argument and referred the motions to a federal magistrate sitting as special master" is unfounded. None of the PLF papers filed before the referral (CR 506 & CR 510) even contained the word "jurisdiction."

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[18] In CR 506, through counsel expressly signing for the PLF, the PLF joined with the others in a stipulation setting forth and requesting a briefing and hearing schedule, but PLF did not assert or reserve any objection to "*in personam* jurisdiction.". On CR 510, the attorneys for PLF in the sanctions proceedings simply listed their appearance as "Attorneys for Pacific Legal Foundation" without any attempt to qualify or restrict their appearance.

4. *Imposing sanctions on the PLF was not "in direct conflict" with this court's decision in Zenith v. Hazeltine.* In this litigation, the District Court imposed sanctions on the PLF, which not only appeared and actively participated in the sanctions proceedings, but also was found to have "actively participated" in the underlying litigation. *Zenith Corp. v. Hazeltine,* 395 U.S. 100, 108-112 (1968) did not involve sanctions issues or a court's need to protect itself or its procedures from misuse. The case is inapposite, and no conflict exists requiring this court's attention.[19]

5. *Imposing sanctions on the PLF was also not in conflict with the Seventh Circuit's decision in Panther Pumps.* Similarly, there is no conflict between the Seventh Circuit's decision in *Panther Pumps & Equipment Co. v. Hydrocraft, Inc.*, 566 F.2d 8 (7th Cir. 1977), and the Ninth Circuit's decision herein. It is also inapposite, another non-sanctions

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[19] For example, in contrast to the PLF's participation in both the underlying litigation and the sanctions proceedings, Hazeltine, the corporation whose name appeared in a judgment "based wholly on the stipulation of HRI," "did not execute the stipulation," "never formally appeared at trial," and "never had its day in court". The judgment against Hazeltine was on a counterclaim which only named HRI as a defendant. "Hazeltine made no appearance in the litigation until Zenith proposed that judgment be entered against it, at which time, Hazeltine filed a 'special appearance.'" The Supreme Court also noted that the record did not show that, when Hazeltine made its special appearance, the district court found it to have been "in active concert or participation" with HRI. *See also Hazeltine Research, Inc. v. Zenith Radio Corporation,* 388 F.2d 25, 30 (7th Cir. 1967) ("At no time during the trial did [Hazeltine] have an opportunity to show that it was not the alter ego.") The PLF herein had numerous opportunities to address the sanctions issues and actually appeared and participated in the sanctions proceedings.

case involving a company which did not participate in either the underlying litigation or the post-judgment proceedings. If anything, the Seventh Circuit's willingness to hold Beck in contempt based on his relationship to the underlying litigation, although he had not been a party to the underlying litigation, would tend to support the District Court's decision herein. That it dismissed the appeal as to Universal, a company formed by Beck after the initial judgment, is immaterial. Unlike Universal, which apparently did not participate in Beck's show cause proceedings, the petition herein concedes that the PLF "appeared before the district court to defend against the sanctions motions". Pet. 13.

The District Court found that "PLF actively participated" in the underlying litigation. The petition concedes PLF's appearance and participation in the sanctions proceeding. The petition, however, inaccurately asserts that PLF raised and argued an "*in personam* jurisdiction" objection in CR 510 and CR 585. Pet. 3-4. The petition's second contention is not presented by the petition or the record, and the petition should be denied.[20]

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[20] The absence of an express "*in personam* jurisdiction" objection and argument is telling, because the PLF did argue even minor technical points if it desired to raise them. A court order had expressly extended the time in Local Rule 270-1. CR 472. Nevertheless, PLF did try to argue in CR 510 that the motions were untimely for failure to comply with that very rule, despite the court's express order and despite that rule's express reference permitting the judge to "grant extensions of time for the filing of an application." This "point" would hardly have been "jurisdictional," and it was certainly not an "*in personam* jurisdiction" argument. It does illustrate, however, that the PLF's failure to raise "*in personam* jurisdiction" expressly was a conscious decision. The argument now made is merely a contrivance.

CONCLUSION

The claims presented by PLF's petition are neither significant nor meritorious, and the lower court's actions are fully supported by the copious record that was developed so painstakingly by the Special Master and the District Court. For these reasons, granting the petition would serve no useful purpose. By contrast, allowing PLF to prolong these proceedings would impose serious additional hardship upon BCPUD. Its meager financial resources have already been severely taxed, and further litigation in this Court would only add to these burdens. That hardship would remain even after BCPUD prevailed on the merits of the issues which PLF's petition attempts to raise.

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By: Richard E.V. Harris

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APPENDICES

APPENDIX N

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Attorneys for Defendant Bolinas
Community Public Utility District

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, SUSAN IRLAND LOCKARY; PHYLLIS GILBERT; CHARLES GILBERT; JAMES MACEY; ANTON HOLTER: MESA RANCH INC., a California limited partnership,	) Civ. No. C-82-6191 SW)) DECLARATION OF RICHARD E.V. HARRIS IN SUPPORT OF BCPUD'S APPLICATION FOR ATTORNEYS' FEES AND EXPENSES
Plaintiffs,	
v.	
PAUL KAYFETZ; VICTOR AMOROSO; MARY LOWRY;	) Date: April 6, 1988) Time: 10:00 a.m.

DIANA LOPEZ FARNSWORTH; EDWARD C. RILEY; PETER WARSHALL; DORIS ELAINE LeMIEUX; JACK BOWEN McCLELLAN; J. MICHAEL GROSHONG; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,an incorporated public utility district; BOLINAS PLANNING COUNCIL, a non-profit corporation; JOHN GOODCHILD; GREGORY C. HEWLETT; STEVE MATSON; PATRICIA L. SMITH; RAY MORITZ; ROBERT J. SCAROLA; DIANE MIDDLETON McQUAID; FREDERICK G. STYLES; and the COUNTY OF MARIN,

Defendants.

I, Richard E. V. Harris, do hereby declare as follows:

1. I am a partner with the law firm of Orrick, Herrington & Sutcliffe and am one of the attorneys for defendant Bolinas Community Public Utility District ("BCPUD"). If called as a witness, I could testify to the following of my own personal knowledge.

2. My firm was retained by BCPUD to represent it in this action in November 1982. BCPUD is a public utility district which provides water service and sewer service

to customers in the Bolinas area. As indicated by financial and other reports, BCPUD has always been in precarious financial condition. Attached to this Declaration as Exhibit A is a true and correct copy of BCPUD's audited financial statement for the fiscal year ending June 30, 1982. As shown therein, for the fiscal year which preceded the filing of this lawsuit, BCPUD's total revenues amounted to only $278,571. For that same period, BCPUD's expenses totalled $277,115. To finance its defense efforts, BCPUD was forced to impose a special assessment which, I am informed, substantially increased the economic burden on users of BCPUD water sources.

3. The financial difficulties which BCPUD would (and did) face in defending the claims asserted against it in this action were well-known. Attached to this Declaration as Exhibit B are the reported comments of one of the plaintiffs, Matthew Lockary, who is said to have commented about a month before this action was filed that BCPUD was "nearly broke" and would be hard pressed to defend the suit.

* * *

8. In recognition of the fact that focused discovery would be virtually impossible in light of the broad, garbage-can nature of the complaint and amended complaints, I proposed to this Court at an early stage that all discovery be stayed until the motions to dismiss were resolved. On March 3, 1983, in its initial status conference order, this Court ordered a stay of discovery until defendants' motions to dismiss were resolved.

9. Notwithstanding the stay of discovery which was ordered by the Court, plaintiffs' counsel made a request on September 30, 1983 under the California Public Records Act that asked BCPUD to produce virtually each and every

document in its possession relating to the moratorium. Notwithstanding the extraordinary broad nature of the request and the existence of the discovery stay, BCPUD did its best to respond. After obtaining certain clarification and limitations on the request, BCPUD made available virtually all of its documents relating to its water system or the moratorium. Nevertheless, the Pacific Legal Foundation ("PLF") pursued litigation in state court seeking a writ of mandate against BCPUD to produce the requested documents.

10. In response to the PLF's complaint, the Superior Court of Marin County concluded that the PLF's claims were wholly without merit. The Court went on to find that the plaintiff's case was "clearly frivolous" and brought solely "to harass the District" and "for an improper motive." The Court awarded sanctions against the PLF. Attached to this declaration as Exhibit E is a true and correct copy of the Superior Court's decision. This decision was affirmed on appeal. Attached to this declaration as Exhibit F is a true and correct copy of the decision of the First Appellate District affirming the lower court's decision.

* * *

16. I am aware that the PLF is a well-financed organization engaged primarily in the "business" of litigation. Attached as Exhibit G is a true and correct copy of the PLF's Periodic Report filed with the State of California for the year ending February 28, 1983. That annual report reflects that the PLF received gross contributions for that year in excess of $2,200,000. The PLF Periodic Reports for the subsequent three years each reflect gross contributions in excess of $2,000,000.

17. Attached to this declaration as Exhibit H is a PLF publication which discusses the Lockary litigation. On

page 2 of that publication, the PLF's president explains his rationale in asserting massive damages claims against so many individual defendants.

18. I am aware that the PLF has made reference to the Lockary litigation in reports to prospective contributors and has publicized its efforts in this case. Even after the claims in this action were rejected by the Court, the PLF continued to publicize its litigation effects against BCPUD. Thus, within the past few months, the PLF publicized its more recent filing of a state action against BCPUD challenging the same moratorium that was the subject of the present action. Attached to this declaration as Exhibit H through K are copies of some of the PLF publicity references to its litigation against BCPUD.

Executed this 16th day of February, 1988, at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

_____

Richard E. V. Harris

APPENDIX O

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Attorneys for Defendant Bolinas
Community Public Utility District

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, PHYLLIS GILBERT; CHARLES GILBERT; JAMES MACEY; ANTON HOLTER,	) Civ. No. C-82-6191 SW
Plaintiffs,	) DECLARATION OF RICHARD E.V. HARRIS AND REQUEST FOR JUDICIAL NOTICE RE: (a) PACIFIC LEGAL FOUNDATION LAW FIRM AND (b) THE $30 MILLION-PLUS PRAYER
v.	
PAUL KAYFETZ; VICTOR AMOROSO; MARY LOWRY; DIANA LOPEZ FARNSWORTH; EDWARD C. RILEY; FREDERICK B. McCLELLAN; PETER WARSHALL; DAVID L. VAN	) Date: June 15, 1988) Time: 10:00 a.m.

DUSEN; DORIS ELAINE LeMIEUX; JACK BOWEN McCLELLAN; J. MICHAEL GROSHONG; WILLIAM NIMAN; JUDITH WESTON, as individuals; BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT, an incorporated public utility district; BOLINAS PLANNING COUNCIL, a non-profit corporation; JOHN GOODCHILD; GREGORY C. HEWLETT; STEVE MATSON; PATRICIA L. SMITH; RAY MORITZ; ROBERT J. SCAROLA; DIANE MIDDLETON McQUAID; FREDERICK G. STYLES, as individuals; and the MARIN COUNTY PLANNING DEPARTMENT,

Defendants.

DECLARATION

I, Richard E.V. Harris, do hereby declare that:

1. I am a member of the Bar of the State of California, a member of the bar of this court, and a member of the law firm of Orrick, Herrington & Sutcliffe, attorneys for defendant Bolinas Public Utility District ("BCPUD") herein.

(a) PLF LAW FIRM

2. I have read the separate opposition papers filed on behalf of the Pacific Legal Foundation, which I found rather curious. Throughout the separate opposition filed by the Pacific Legal Foundation, it refers to itself variously as (i) "a California nonprofit corporation qualified under Internal Revenue Service Rules to receive tax-deductible donations," (ii) "not a party in this case", (iii) "a charitable corporation", (iv) "a nonparty corporation", (v) "a nonparty-nonattorney corporation", and (vi) "neither a party to this case nor an attorney admitted to practice before this Court."

3. Nowhere in the papers does the Pacific Legal Foundation refer to itself as it, and its attorneys, normally describe it -- a "law firm" or, more particularly, a "public interest law firm." This declaration provides some illustrations. (Unless otherwise indicated, the emphasis in quotations in this declaration has been supplied.) Defendant BCPUD requests judicial notice of the particular references identified. The exhibits (attached hereto and those attached to the Harris Declaration filed February 16, 1988) are provided in further support of that request.

4. The Pacific Legal Foundation has represented itself to be a law firm which participates in litigation "as counsel" and which exercises "quality control." For example, the Pacific Legal Foundation's "Tenth Annual Report 1973-1983" the first page of text includes the following:

> It was to evolve into the Pacific Legal Foundation, the largest nonprofit public interest law firm of its kind . . . . PLF's case selection . . . . PLF participates in cases nationwide as plaintiff, as counsel and as

"friend of the court. . . . insured quality control . . . .

(See Harris Decl. filed February 16, 1988, Exh. I.)

5. The Pacific Legal Foundation has represented itself to the Internal Revenue Service and to the Attorney General of California as a "Public Interest Law Firm." A copy of the Pacific Legal Foundation's Periodic Report to Attorney General of California for the year March 1, 1982 through February 28, 1983 which expressly incorporates the IRS Form 990, Return of Organization Exempt from Income Tax, for the same period, is attached as Exhibit G to the Harris Declaration filed February 16, 1988. See IRS Form 4562 where the business or activity of the Pacific Legal Foundation is expressly stated to be "Public Interest Law Firm." Attached hereto as Exhibit A is a true and accurate copy (provided by the State of California at my request) of the Pacific Legal Foundation's Periodic Report to Attorney General of California for the period March 1, 1983 through February 29, 1984 (when the amended complaint was filed herein), also expressly incorporating IRS Form 990 which also includes IRS Form 4562 expressly identifying the business or activity of the Pacific Legal Foundation as "PUBLIC INTEREST LAW FIRM."

6. Ronald A. Zumbrun (the senior PLF attorney, whose name is on all or virtually all papers filed in this case by the PLF) refers to the Pacific Legal Foundation as a "law firm" and also refers to someone represented as a "Pacific Legal Foundation client". For example, the May 13, 1985 issue of The Recorder (at page 4) contains a "viewpoint" article by Ronald A. Zumbrun entitled "Pacific Legal Foundation Reviews Critical Property Rights Cases". Identified as "one of a series of articles by Ronald A. Zumbrun, President of the Pacific Legal Foundation," the

text of the article begins by stating that, when the Pacific Legal Foundation was formed in Sacramento in 1973,

> it became the first nonprofit public interest law firm which litigated in support of the free enterprise system . . . .

Halfway through the article, Mr. Zumbrun turns to a Coastal Commission matter in this way:

> Ponder the plight of another Pacific Legal Foundation client, Viktoria Consiglio.

7. On the next day, May 14, 1985, The Recorder (at page 2) contained another viewpoint article by Ronald A. Zumbrun, who is identified as "President of the Pacific Legal Foundation, a Sacramento-based public interest law firm that litigates in support of limited government . . . ." This viewpoint article includes references to the Gilberts' claim against BCPUD, including the following:

> If the Gilberts prevail, they will be entitled to damages against the members of the board of directors of the water of district who, under the Civil Rights Act, would be personally liable to those individuals whom they have intentionally damaged. If successful, this lawsuit will have precedential value nationally and could single-handedly reverse the confiscatory trends in the area of land use regulation.

This Zumbrun viewpoint article is entitled "Pacific Law Foundation's Involvement in Limiting Reach of Government." Attached hereto as Exhibit B are true and accurate copies of these articles from the May 13 and 14,

1985 issues of The Recorder.

8. The March, 1983 issue of Pacific Legal Foundation's The Reporter contains a "President's Message" column by Ronald A. Zumbrun which is entitled "Just Compensation: The Case We've Been Waiting For." In it, his references to the Bolinas litigation include:

> PLF has filed suit against the district in federal court, thus circumventing the California courts, which have been decidedly reluctant to clarify the just compensation issue in other PLF cases. We are seeking substantial personal damages from the water district board members, putting all government entities on notice that we are going to the mat with this one.

On the first page of that same issue of the The Reporter, there is another article referring to this litigation entitled "PLF Files Major Water Rights Case." (Mr. Zumbrun's column expressly references that article.) The article includes the following references:

> One of the most significant PLF lawsuits in recent years was filed late last year in San Francisco federal court . . . .
>
> PLF filed suit on behalf of five property owners in Bolinas . . . .
>
> By filing this suit in federal court, PLF hopes to stem this frightening practice from moving nationwide.

***

> As in many land use cases brought by PLF, ...
>
> The PLF suit alleges that water district policies violate the Fifth Amendment guarantee of payment of just compensation, ... This case will be an extremely important one for PLF, ...

Attached hereto as Exhibit C is another copy of the above stories from Pacific Legal Foundation's March 1983 issue of The Reporter.

9. The Pacific Legal Foundation's literature soliciting contributions also describes the PLF as a "law firm." For example, the first page of a December 22, 1982 solicitation letter (sent shortly after this case was filed) contains the following:

> Pacific Legal Foundation is an independent nationwide public interest law firm defending individual freedom, private property rights, and the free enterprise system. PLF is successfully confronting governmental bureaucracies, environmental extremists, welfare rights organizations, and other special interest groups.

Later, the solicitation letter states:

> Today, PLF is handling more than 100 legal proceedings across the United States. Your financial assistance will make it possible to carry this burden to conclusion.

Attached hereto as Exhibit D is a true and accurate copy of

the PLF's December 22, 1982 solicitation letter.

10. At the beginning of the PLF's separate opposition papers, there appears this sentence:

> Pacific Legal Foundation has not signed a "pleading, motion, or other paper" to be filed in this court.

The statement was apparently made in an effort to dispel any idea that the Pacific Legal Foundation really has had anything to do with this litigation. While I have not reviewed all the files, a quick beginning revealed the following examples where papers were expressly signed on behalf of the Pacific Legal Foundation:

> PACIFIC LEGAL FOUNDATION
>
> By: /signed/
> DARLENE E. RUIZ
> Attorneys for Plaintiffs
> MATTHEW LOCKARY; PHYLLIS GILBERT;
> CHARLES GILBERT; JAMES MACEY;
> ANTON HOLTER

(See Docket No. 5)

> Pacific Legal Foundation
>
> by /signed/
> Darlene Ruiz
> Attorney for Plaintiffs

(See Docket No. 6)

Pacific Legal Foundation

by /signed/
Darlene Ruiz
Attorney for Plaintiffs

(See Docket No. 9)

PACIFIC LEGAL FOUNDATION

By /signed/
DARLENE E. RUIZ
Attorneys for Plaintiffs

(See Docket No. 15)

PACIFIC LEGAL FOUNDATION

By /signed/
Darlene E. Ruiz

Attorneys for Plaintiffs

(See Docket No. 17)

PACIFIC LEGAL FOUNDATION

By /signed/
DARLENE E. RUIZ
Attorneys for Plaintiffs

(See Docket No. 18)

11. Of course, the Pacific Legal Foundation's logo, name, address and telephone number were already preprinted on the thousands of pages of papers filed in this action by the PLF attorneys. (See, e.g. Complaint, Docket No. 1 and Amended Complaint, Docket No. 112.) Other PLF use of the law firm logo includes the following example from the PLF's "Tenth Annual Report 1973-1983:"

[INSERT LOGO]

(See Harris Decl. filed February 16, 1988, Exh. I, last page.) In addition, the PLF attorneys' correspondence with the court regarding this litigation, as well as correspondence with opposing counsel and others, has been on Pacific Legal Foundation letterhead.

(b) THE $30 MILLION--PLUS PRAYER

12. The plaintiffs sought enormous damages from, among others, BCPUD and the individual defendants. Plaintiff's opposition papers inaccurately suggest that "the $30 million prayer for damages and the terrifying effect of such a prayer" "was laid to rest nine months after the filing of the Complaint." (Opposition, p. 2: 10-16.) The opposition papers also suggest that the cloud over BCPUD's finances "could only exist, if at all, for about nine months the time between the original Complaint, filed November 10, 1982, and the Amended Complaint, and that after the

dismissal of the antitrust claims, "any cloud existing in BCPUD's imagination surely should have evaporated since the basis for trebling damages was gone." (Id., p. 56: 6-15.)

13. The original Complaint's prayer had numerous references to damages, including the following:

> WHEREFORE, plaintiffs pray for judgment against defendants as follows:
>
> 1. Damages for violation of plaintiffs' civil rights in the amount of $10 million.
>
> ***
>
> 4. Judgments for three times the amount of actual damages for violation of Sections 1 and 2 of the Sherman Act which plaintiffs allege are in excess of $10 million to be trebled as provided by law.
>
> ***
>
> 7. Interim damages for a temporary taking . . . .
>
> 8. In the alternative and cumulatively as appropriate to plaintiffs' prayer for declaratory, injunctive, and interim damage relief prayed for hereinabove, plaintiffs pray for judgment against defendants as follows:
>
> > a. damages for the fair market value of the property in an amount not presently precisely ascertainable but not less than $10 million. A more

> precise amount of damages will be proven and prayed for at time of trial;
>
> b. Interim damages for a temporary taking in an amount not yet precisely ascertainable.
>
> ***
>
> 12. Other consequential damages flowing directly from defendants' course of conduct herein described which plaintiffs may have suffered but not discovered or which they may hereafter suffer.
>
> ***

14. Although the Amended Complaint may have dropped the express dollar amounts, nothing alleged that plaintiffs had changed their position regarding fair market values, the magnitude of actual damages, or the expansive damages sought. Indeed, the Amended Complaint filed August 3, 1983, increased the number of plaintiffs, the number of defendants, and the number of "claims." There was no reduction in the amount of property allegedly "taken" (which plaintiffs alleged in the original Complaint had a "fair market value . . . not less than $10 million"). Both complaints sought a determination and trebling of the actual damages resulting from the alleged antitrust violations (which the plaintiffs alleged in the original Complaint were "in excess of $10 million"). Additionally, the prayers in both complaints continued to seek civil rights damages, interim damages, attorneys' fees, litigation costs, and other monetary items, including "[o]ther consequential damages flowing from the defendants' course of conduct . . . which plaintiffs may have suffered but not discovered or which they may hereafter

suffer."

15. When the Amended Complaint was filed, there was no formal or informal statement by plaintiffs or plaintiffs counsel that the Amended Complaint sought less in damages than was sought in the original Complaint. Although the prayers in both complaints state that damages for the fair market value of the property allegedly taken would be proven and prayed for at the time of trial, I can find nothing in the Amended Complaint which, for example, backs off the allegation of the original Complaint that the fair market value of the property taken is "not less than $10 million."

16. In April 1984, other defense counsel and I met with plaintiffs' counsel to discuss various matters relating to discovery. Following up on oral requests made at that meeting, I wrote plaintiffs' counsel on April 23, 1984 requesting, among other things, their contentions as to the amount of damages each plaintiff was seeking plus the basis for the claimed damages. A true and accurate copy of my letter of April 23, 1984 is attached hereto as Exhibit E. The information was not provided, despite repeated requests, both oral and written. Attached hereto as Exhibit F is a copy of my letter dated May 9, 1985 to plaintiffs' counsel, which contains another written request for the damages contention information. The requested information regarding the damages amounts (and bases) was never provided.

17. As recently as the Ninth Circuit prebriefing conference, which was held on March 28, 1988 plaintiffs' counsel informed me and other defense counsel that plaintiffs were not willing to eliminate any claims against any defendants from their appeal. Plaintiffs' suggestion that the "terrifying effect" of their damages claims "was laid to rest"

in August 1983 is, I believe, inconsistent with the record in this litigation.

Executed this 1st day of June, 1988 at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

Richard E. V. Harris

APPENDIX P

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Attorneys for Defendant Bolinas
Community Public Utility District

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY; SUSAN IRLAND LOCKARY; PHYLLIS GILBERT; CHARLES GILBERT; JAMES MACEY; ANTON HOLTER; MESA RANCH INC., a California limited partnership,	)))))Civ.No. C-82-6191SW/WDB))SUPPLEMENTAL)DECLARATION)OF RICHARD E.V.)HARRIS RE: (a) PLF'S)STATUS, AND (b))SANCTIONS PAID BY
Plaintiffs,	)PLF IN CONNECTION)WITH 1983 PUBLIC

v.	)RECORDS ACT
	)LITIGATION
	)AGAINST BCPUD AND
BOLINAS COMMUNITY	)SUBSEQUENT APPEAL
PUBLIC UTILITY	)
DISTRICT; PAUL	)
KAYFETZ;	)Status Conference
VICTOR AMOROSO;	)
MARY LOWRY;	)Date: March 14, 1989
DIANA LOPEZ	)Time: 10:00 a.m.
FARNSWORTH;	)
C. RILEY; PETER	)
WARSHALL; DORIS	)
ELAINE LeMIEUX;	)
JACK BOWEN	)
McCLELLAN;	)
J. MICHAEL GROSHONG;	)
WILLIAM NIMAN;	)
ORVILLE SCHELL;	)
MARGUERITTE HARRIS;	)
JUDITH WESTON;	)
BOLINAS COMMUNITY	)
PUBLIC UTILITY	)
DISTRICT, an	)
incorporated public	)
utility district;	)
BOLINAS PLANNING	)
COUNCIL, a non-profit	)
corporation; JOHN	)
GOODCHILD; GREGORY	)
C. HEWLETT; STEVE	)
MATSON; PATRICIA L.	)
SMITH; RAY	)
MORITZ; ROBERT J.	)
SCAROLA; DIANE	)
MIDDLETON McQUAID;	)

FREDERICK G. STYLES; and the COUNTY OF MARIN,

Defendants.

I, Richard E.V. Harris, do hereby declare as follows:

1. I am a partner with the law firm of Orrick, Herrington & Sutcliffe and one of the attorneys for defendant Bolinas Community Public Utility District ("BCPUD"). If called as a witness, I could testify to the following of my own personal knowledge.

A. PLF'S STATUS

2. This portion of this declaration supplements the DECLARATION OF RICHARD E.V. HARRIS AND REQUEST FOR JUDICIAL NOTICE RE: (a) PACIFIC LEGAL FOUNDATION LAW FIRM AND (b) THE $30 MILLION-PLUS PRAYER, filed June 1, 1988, and made part of BCPUD's APPENDIX filed January 6, 1989, at Tab No. 9. In paragraphs numbered 2-11, and the exhibits thereto, I referred to various Pacific Legal Foundation ("PLF") statements that it was a "law firm," that it participated in cases "as counsel," and that a person represented was a "Pacific Legal Foundation client." In paragraph 10, I also referred to specific instances in this Court's files where papers were expressly signed on behalf of the Pacific Legal Foundation.

3. In its recent "RESPONSE OF PACIFIC LEGAL FOUNDATION TO THE MOTION FOR SANCTIONS," the

PLF states on page 1 that "PLF is neither a party to this case nor an attorney for a party." On page 4 the PLF states that "BCPUD requests sanctions against 'plaintiffs and their attorneys' -- a group that does not include Pacific Legal Foundation within its membership." And, on page 6, the PLF states that "PLF was not 'plaintiffs' counsel' in this action, ..."

4. The recent statements by the PLF in its response to the motion for sanctions seemed to me to be at odds with not only the PLF's statements in its own publications and the record referred to above, but also with PLF correspondence with BCPUD after this case had been pending for approximately one year. In a letter to BCPUD's general manager from PLF attorney James I. Collins on Pacific Legal Foundation letterhead, Mr. Collins stated:

> PLF is the attorney for plaintiffs in Lockary; it is not a party.

Attached hereto as Exhibit A is a true and accurate copy of the November 2, 1983 letter from PLF attorney Collins to BCPUD General Manager Buchanan, which copy is attached to a Declaration of Phil Buchanan in Wolfe v. Bolinas Community Public Utility District (Marin County Superior Court No. 115257).

B. SANCTIONS PAID BY PLF

5. In its response to the motion for sanctions and attorneys fees herein, the PLF apparently is attempting to distance itself from the state court decisions in Wolfe v. Bolinas Community Public Utility District by stating that "no sanctions were expressly levied against PLF." (Emphasis original.) A true and accurate copy of the Marin County

Superior Court's January 19, 1984, Order is in BCPUD's Appendix filed January 6, 1989 at Tab No. 8, Exhibit E. It states, in part:

> Respondent would be entitled to attorneys fees if the Court finds that the "plaintiff's case is clearly frivolous . . ."
>
> It would appear that petitioner brought this action to harass respondent district. Petitioner is represented by Pacific Legal Foundation as is the plaintiff in the federal action. It appeared that the disclosures plaintiff sought in this action were to be used in prosecuting the federal action. A review of events leading to the filing of this action convinces this Court that this action was brought for an improper motive. Therefore, respondent is entitled to reasonable attorneys fees and costs. A reasonable fee for such services is $1,360.00 plus court costs of $14.50. Respondent shall have judgment against petitioner for said sums.

6. The Marin Court Superior Court's decision was affirmed by the Court of Appeal for the First Appellate District. A true and accurate copy of that appellate decision can be found in BCPUD's Appendix at Tab No. 8, Exhibit F. In a unanimous decision, the court stated, in part:

> Appellant argues that the judgment must be reversed because . . . and (3) the action was brought in good faith. We disagree with each of these contentions.
>
> On September 30, 1983,

> appellant, through his attorneys, the Pacific Legal Foundation, contacted respondent. He requested that he be permitted to inspect, as the trial court put it, 'virtually all of [respondent's] records.'
>
> * * *
>
> Finally, appellant disputes the trial court's finding that he brought the action for an improper motive and meant 'to harass respondent district.' Considering the sheer volume of documents which appellant designated, his demands of immediate compliance with these extensive requests; his insistence on filing suit in spite of respondent's keeping him constantly informed of its progress; and his going forward with the December 9 hearing even though respondent had already made the records available to his satisfaction, the trial court's determination was reasonable and well supported by the evidence. Respondent was properly awarded costs and attorneys fees. (Emphasis in original)

7. Although the recent PLF response states that "no sanctions were expressly levied against PLF," it does not state that the sanctions were not, in fact, paid by the PLF. As outlined below, the PLF, not Wolfe, apparently did pay the sanctions/attorney fees resulting from the two state court decisions in Wolfe.

8. With respect to request for BCPUD's documents, the formal application signed by PLF attorney lists the "Pacific Legal Foundation" as the "applicant," not Wolfe or anyone else. A true and accurate copy of the BCPUD form signed by the PLF attorney is attached hereto as Exhibit B.

9. The bad faith and harassment findings having been affirmed along with the Government Code Section 6259 attorneys fee award, BCPUD sought additional fees and costs of $4,708.80 under that Government Code Section in a state court filing on July 21, 1986.

10. I was informed shortly after September 5, 1986 that the $4,708.80 was paid by a Pacific Legal Foundation check, numbered 2602, dated 8-25-86, drawn on a PLF account at the Great American Federal Savings and Loan Association in Sacramento, California, sent to BCPUD's attorney in Wolfe. Attached hereto as Exhibit C is a true and accurate copy of the cover letter I received together with a copy of the PLF check. I have subsequently been informed that the remainder of the $6,274.25 (the $1,274.50 awarded by the trial court in 1984 and $190.90 interest) were paid using Great American cashier's checks, dated 7-10-86 and 7-17-86, which were also sent by the PLF to BCPUD's attorney in Wolfe.

Executed this 6th day of March, 1989, in the City and County of San Francisco.

I declare under penalty of perjury that the foregoing is true and correct.

_____

Richard E. V. Harris

APPENDIX Q

RICHARD E. V. HARRIS
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Attorneys for Defendant Bolinas
Community Public Utility District

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, SUSAN IRLAND LOCKARY; PHYLLIS GILBERT; CHARLES GILBERT; JAMES MACEY; ANTON HOLTER: MESA RANCH INC., a California limited partnership,	) Civ. No. C-82-6191 SW/WDB) DECLARATION OF RICHARD E. V. HARRIS IN FURTHER SUPPORT OF BCPUD'S APPLICATION FOR SANCTIONS/FEES [STAGE II PROCEEDINGS]
Plaintiffs,	
v.	
PAUL KAYFETZ, VICTOR AMOROSO; MARY LOWRY;	

DIANA LOPEZ FARNSWORTH; EDWARD C. RILEY; PETER WARSHALL; DORIS ELAINE LeMIEUX; JACK BOWEN McCLELLAN; J. MICHAEL GROSHONG; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT, an incorporated public utility district; BOLINAS PLANNING COUNCIL, a non-profit corporation; JOHN GOODCHILD; GREGORY C. HEWLETT; STEVE MATSON;PATRICIA L. SMITH; RAY MORITZ; ROBERT J. SCAROLA; DIANE MIDDLETON McQUAID; FREDERICK G. STYLES; and the COUNTY OF MARIN,

Defendants.

I, Richard E.V. Harris, do hereby declare as follows:

1. I am a member of the Bar of the State of California and member of the Bar of this Court. I am also a member of the law firm of Orrick, Herrington & Sutcliffe, attorneys for defendant Bolinas Community Public Utility District ("BCPUD") in this action. If called as a witness, I could testify to the following of my own personal knowledge.

PLF OPERATIONS:
FINANCIAL RESOURCES

2. According to the IRS Form 990's filed by the Pacific Legal Foundation ("PLF") with its Periodic Reports to the Attorney General of California, the PLF's annual revenues have been substantial during each of the years that the Lockary case has been pending. Total PLF revenues (by fiscal year) are shown on those reports as follows:

PLF Fiscal Year	PFL Revenues Per IRS Form 990
1982-1983	$2,559,274
1983-1984	2,446,651
1984-1985	2,481,839
1985-1986	2,265,076
1986-1987	2,405,115
1987-1988	2,905,457
1988-1989	4,217,701
1989-1990	5,835,885

From 1982-83, when Lockary was filed, through February 1990, the PLF's total revenues, as shown on these reports, were $25,116,998. True and accurate copies of excerpts from the IRS 990's filed as part of those reports are attached as Exhibit A.

3. The PLF publishes In Perspective, a newsletter. The Winter 1989 issue contained the PLF's description of one of its fundraising activities. Entitled "PLF Fundraising Event Brings Private Property Advocates Together," the PLF description contained the following:

More than 250 members of the nation's

> real estate development community gathered in Sacramento on November 2 for a special fundraising tribute to PLF's activities in the land use and private property arena.
>
> * * *
>
> Following Zumbrun, Raymond Watt, chairman of Watt Industries in Los Angeles and a member of the Host Committee, expressed his thanks to the Foundation and asked everyone present to carry the PLF fundraising flag.
>
> "If every PLF supporter would call just one other potential supporter, we could take care of PLF's funding needs overnight," he said.

Attached as Exhibit B is a true and accurate copy of the page from the Winter 1989 issue of the PLF's In Perspective.

PLF OPERATIONS:
LITIGATION LAW FIRM STATUS, LITIGATION AND TRAINING FUNCTIONS

4. Additional information regarding the PLF and its operations is provided below. Most of the information comes directly from the PLF's own publications; that information is provided first.

5. According to its annual reports, the PLF claims a very close relationship to the litigation process and the courts. The annual reports indicate that the PLF is not merely a law firm but that it is a litigation law firm. At least one report says that the PLF regards "the courtroom" as its

"forum." Another says that the PLF's "main function is litigation."

6. Excerpts from some annual reports and other PLF publications are identified and highlighted below. (The emphasis in quotations below has been supplied unless otherwise indicated.) True and accurate copies of the referenced pages from those annual reports are attached hereto as Exhibits C through I.

7. The PLF's first annual report, "Pacific Legal Foundation, The First Report: A Record of Achievement, Winter 1973-74" began with a "Message From the Chairman" on the inside cover which said:

> The Pacific Legal Foundation, a non-profit public interest law firm, was established to correct an imbalance in the presentation of issues in litigation that involves major public policy.
>
> * * *
>
> Although it has been operating less than one year, the Foundation has won several important victories and is involved in scores of legal cases . . . . It is protecting your interests, assisting the courts, and performing a vital public service by presenting "the other side" on issues of major public interest.

8. The chairman's message in that same annual report was followed with a "Statement of Purpose" which said, among other things:

> The Foundation has received wide support . . . . The legal activities of the Foundation will be guided by these principal policies, adopted by the Board of Trustees:
>
> 1. The Foundation shall represent California citizens, individual or corporate, and citizens of the United States, on matters of public interest at all levels of the administrative and judicial process.
>
> 2. The Foundation shall insure that all interests are fully and properly represented in court on issues affecting the public and private sectors.
>
> 4. The Foundation shall not derive any financial benefit from the legal services it provides.
>
> * * *
>
> 10. A Board of Trustees shall be appointed, consisting of not less than 16 nor more than 19 members, of which a majority shall be members in good standing of the State Bar of California.

9. The "Report of the Executive Vice President-Administrator" in the PLF "Third Annual Report, 1975" expressly identified the central nature of litigation:

> Because we recognize that the Foundation's main function is litigation, the vast majority of our funds are directed to legal activities.

10. The PLF's "Fourth Annual Report begins by asserting on page one that "the courtroom" is the PLF's forum:

> Pacific Legal Foundation
> Our client: The taxpayer
> Our Forum: The courtroom
>
> * * *
>
> Reason and responsibility are our arguments. The courtroom is our forum.
>
> * * *
>
> Our purpose is to present to the courts . . . .
>
> * * *
>
> Since its founding in 1973, the Foundation has been actively involved in more than 100 legal proceedings . . . .
>
> * * *
>
> Pacific Legal Foundation is governed by a board of prominent citizens, the majority attorneys . . . .

Ronald Zumbrun's "President Message" on the third page continues the theme, stating among other things:

> During the past fiscal year, the Foundation handled more litigation than the total for its first three years combined.

* * *

> The Foundation will continue to be highly selective in choosing litigation in which to enter.

11. The PLF's "Fifth Annual Report" continued the litigation theme, introducing the PLF on page one with such comments as:

> Since its founding, [PLF] has been actively involved in more than 150 legal proceedings, winning 80 percent of those which have reached final decision.

* * *

> It . . . has litigating offices in Sacramento, California, and Washington, D.C., a liaison office in Seattle, Washington, and a project office in San Diego, California.
>
> The PLF record of legal victories is impressive by any standard -- proof of the impact possible when aggressive, independent and dedicated professionals speak rationally for the broad public interest.

Ronald Zumbrun's "President's Message" on page three continues the litigation law firm theme:

> . . . for Pacific Legal Foundation handled and won more cases than in any past year.

* * *

> As the pioneer of law firms advocating the broad public interest of working men and women in business, agriculture and industry, PLF remains the model to be followed in this field.
>
> * * *
>
> PLF's winning team of attorneys is supported by an exceptional legal and administrative staff . . . backed by an outstanding Board of Trustees.
>
> We select cases which deal with key precedent-setting issues. Every case is a test case.

The same annual report describes PLF activities using such phrases as "PLF successfully defended a lawsuit . . . [p. 9], "Pacific Legal Foundation successfully represented individual employees . . . " [. 11], "[r]epresenting various builders and contractors, PLF challenged a federal law . . . " [id.], and "Pacific Legal Foundation is involved in numerous suits challenging . . . ." [id.].

12. The PLF's "Sixth Annual Report, 1978-1979" introduces the PLF on page one with such comments as:

> PLF brings the viewpoint of this segment of the public before the courts.
>
> In the beginning, PLF's litigation focused on issues that surfaced in the Pacific region.
>
> * * *

Today, PLF litigates from coast to coast . . . .

* * *

PLF litigates in all areas of the public interest . . . .

"A Message from the President and Chairman of the Board" on page three of the same annual report continues with references to "a PLF suit," "[t]he Foundation is litigating," "[t]hree PLF actions," "in two cases before the Ninth Circuit Court of Appeals, PLF argued," "PLF has filed suit," and "PLF has an ambitious litigation program for the coming year." The same annual report contains such references to PLF activities as "PLF represented the supervisors suing HEW . . . " [p. 7] and "PLF is assisting the plaintiff to obtain a rehearing and has been asked to act as co-counsel . . . " [p. 9].

13. The PLF's "Seventh Annual Report, 1979-1980" introduces the PLF on page one by quoting from the "policy concept" adopted by the first Board of Trustees and referring to itself as a "law firm." On page three, "Looking Ahead," signed by Ronald Zumbrun begins: "PLF is a public interest law firm . . . " In the annual report, descriptions of PLF's activities include "[r]epresenting the city of Chula Vista, PLF is also challenging the commission's authority . . . " [p. 8].

14. The PLF's "Eighth Annual Report, 1980-1981" has a "Year in Review" on page one which begins:

> In its eighth year of litigating in the public interest, [PLF] participated in more than 100 cases from coast to coast.

In New York, PLF represented construction workers . . . ."

Other references to PLF activities in the annual report included "[i]n Alaska PLF brought suit . . . ." [p. 1], "[i]n an unrelated action, PLF helped defend . . . ." [id.], "PLF represented San Francisco's controller, who was sued by the city . . . " [id.], a list limited to "only litigation in which PLF actively participated," [p. 4], "PLF has litigated case after case . . . " [p. 8], "PLF agreed to represent them . . . " [id.], "Jacobs . . . asked PLF to represent him" [p. 10], and "PLF represented him and his office in the successful suit argued before the court of appeal" [p. 12].

15. The PLF's "Ninth Annual Report, 1981-1982" contains a list on page three of "litigation in which PLF actively participated in 1981-82" identifying eighty cases. Elsewhere descriptions of the PLF's activities include "[i]n a similar case, PLF represented 13 farmworkers who were fired . . . " [p. 6], "Justice Kaufman asked PLF to represent him" [id.], "[i]n San Francisco, PLF is defending the city controller who is being sued . . . " [id.], and "[r]epresenting the California Grange and individual owners of small farms, PLF has intervened in the case . . . " [id.].

16. These foregoing excerpts reflect the self-described role of the PLF and its relationship to litigation and the to courts during the nine years of PLF activities immediately prior to the filing of this action. The PLF's "Tenth Annual Report", issued during the year in which this action was filed, was reviewed in an earlier declaration, which appears at Tab 8, Exhibit I, Appendix With Selected Materials. On page one, under the heading "The First 10

Years," that PLF annual report contains the already noted, succinct summary statement: "PLF participates in cases nationwide, as plaintiff, as counsel and as 'friend of the court.'"

17. The PLF's annual reports are but one of the PLF publications describing the PLF's litigation activities in this manner. Similar descriptions have continued right through the pendency of BCPUD's sanctions/fees motion. The Autumn 1989 issue of the PLF's In Perspective, page two, contained a "President's Message" by Ronald A. Zumbrun which began as follows:

> There are a number of different ways that the PLF pursues its litigation efforts. We can file a legal action on behalf of a private individual . . ., we can represent a party by intervening in an ongoing lawsuit . . ., or . . . we can file an amicus curiae or "friend of the court" brief.

The President's message, which was entitled "Why Amicus Curiae Briefs are Important," also included the following comments:

> When you think of the many thousands of lawsuits filed each day, . . . you realize that the PLF could not possibly represent parties in all but a small fraction of the cases that could impact on you legal rights.
>
> * * *
>
> We will continue to represent parties in bringing, defending, and intervening in lawsuits.

A true and accurate copy of page two of the Autumn 1989 issue of the PLF's In Perspective is attached as Exhibit K.

18. Both prior to and during the course of the Lockary action, the PLF has also suggested that it has a role in training attorneys. For example, in its "Sixth Annual Report" in "A Message from the President and Chairman of the Board" on page three, the report refers to a fellowship program where law school graduates "will be given training and experience in public interest litigation by PLF staff attorneys." On page eleven of the same report, there is another reference to "education and training under the direct supervision of PLF senior trial attorneys." The report continues: "The purpose of the program is to train the future leaders of the legal profession in the new and expanding field of public interest law." See Exhibit G.

19. In the November 1981 issue of the California Lawyer, roughly one year before this action was filed, the description of the PLF's activities included the following attributed to Robert Best, one of the PLF attorneys in this action:

> Once it enters a case, PLF stays no matter how costly, says Best. "While we rarely get into a war of attrition, government opponents have tried to play that with us. But they've never won. We won't back off. We go an eye for an eye -- it's part of our reputation," he says.

A true and accurate copy of the article from the November 1981 California Lawyer is attached hereto as Exhibit L.

Executed this __ day of July, 1990, in the City and County of San Francisco.

I declare under penalty of perjury that the foregoing is true and correct.

_____

Richard E. V. Harris

APPENDIX R

ENDORSED
FILE
Nov 22 1991
RENE C. DAVIDSON, County Clerk
By: /s/ Lillian C. Don
Lillian C. Don, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

CHARLES GILBERT; PHYLLIS GILBERT; MATTHEW LOCKARY; SUSAN IRLAND LOCKARY; and JAMES MACEY,	)
	) No. 636481-0
Petitioners and Plaintiffs,	)
	) STATEMENT
vs.	) OF
	) DECISION

STATE OF CALIFORNIA;)
DEPARTMENT OF)
HEALTH SERVICES;)
KENNETH KIZER, in)
his official capacity as)
Director)
of the Department of)
Health Services;)
BOLINAS COMMUNITY)
PUBLIC UTILITY)
DISTRICT; and)
DOES I through XX,)
)
Respondents and)
Defendants.)
_____)

* * *

Essentially, petitioners attack the validity of the Bolinas moratorium on additional water hookups and the administrative process by which petitioners were denied those hookups.

For the reasons set forth below, the Court is determined to deny both petitions.

* * *

III. IS THERE A WATER SHORTAGE EMERGENCY?

Accordingly, the threshold issue in this case is whether there is, in fact, a water shortage emergency. The resolution of this issue will determine not only the validity of the moratorium itself, but also will facilitate the resolution of petitioners' many other claims which are premised on the

assumption that the water emergency is a sham.

* * *

By way of expert testimony which challenges the factual predicates for the moratorium, petitioners rely almost exclusively on the testimony and declaration of Dietrich Stroeh. Stroeh's analysis is directed at the 1982 engineering report of the Department of Health Services which was prepared by Robert Hultquist. Although the DOHS report was not relied on by the District in determining the propriety of the moratorium, it does shed some light on the continuing validity of the water shortage emergency and, thus, on the continuing validity of the moratorium.

As the District points out, Stroeh's disagreement with the DOHS report is largely philosophical.

* * *

Even to the untutored eye, problems with Stroeh's analysis are apparent. First, as the District points out, Stroeh "ignores the fact that [the District's] summer time use is not limited to water taken from Arroyo Honda. [The District] also takes water from its supply of stored water." Thus, "demand" is substantially understated.

* * *

Second, there is no evidence whatsoever that the years from 1982 to 1986 represent a fair sampling for determining long-range water policy. In fact, several of those years were exceptionally "wet".

Third, the assertion that 39 acre-feet annually is available from Arroyo Honda is without demonstrable

foundation.

In sum, the District had substantial expert evidence available to them upon which to make a reasoned decision to declare a water shortage emergency and to enact and maintain a water hookup moratorium.

* * *

In order to obtain the added benefit of objectivity and the additional confidence that the Court has not been misled by the testimony of an expert possibly more persuasive than correct, the Court appointed a special master in accord with Evidence Code section 730. The task of this court-appointed expert was to evaluate the current conditions of the District's water system and to advise the Court as to whether the current and projected water supply conditions in Bolinas constitute a valid water shortage and, thus, justify the continuance of the moratorium.

* * *

In light of this evidence, the Court finds that there is a solid factual basis for declaring a water shortage emergency and, thus, for imposing a moratorium which precludes potential water users from tapping into the water supply which is both fragile and limited. The Court cannot conclude that the District acted in an arbitrary or capricious manner or that their actions were entirely lacking in evidentiary support.

* * *

In this case, the bottom line is whether there is valid water shortage emergency which justifies the moratorium.

Based upon the Administrative record, it seems

apparent that the moratorium has been justified from its inception to the present based upon realistic concerns about the capacity of the district's water system to meet conservative demands in times of continuing drought, particularly given the marginal capacity not only of the storage system, but the delivery system, as well.

* * *

II. WERE PETITIONERS AFFORDED A FAIR HEARING?

* * *

The Administrative Record reflects the comprehensive presentation permitted petitioners in the pursuit of their petitions before the Board. There are numerous appearances, the submission of hundreds of pages of evidence, the opportunity to respond to the District's evidence, and full unencumbered representation by counsel. Apart from the allegations of "inherent" and "personal" biases, petitioners are bereft of any realistic argument that the hearings were deficient in any way. As noted, petitioners' assertions of bias are without foundation in the record.

* * *

The petitions for peremptory and administrative writs are denied.

Dated: November 22, 1991

/s/_____
Richard A. Hodge,
Judge of the Superior Court

APPENDIX S

FILED
Apr 2 - 1990
RICHARD W. WIEKING
CLERK, U.S. DISTRICT
COURT
NORTHERN DISTRICT
OF CALIFORNIA
SAN JOSE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MATTHEW LOCKARY, et al.,	)	
	)	
	)	
	)	C-82-6191(SW)
Plaintiffs,	)	
	)	ORDER ADOPTING
v.	)	FINDINGS OF
	)	MAGISTRATE BRAZIL
PAUL KAYFETZ, et al.,	)	
Defendants.	)	
_____	)	

I have carefully reviewed the Report and Recommendations by Magistrate Brazil acting as Special master and filed on January 11, 1990, with respect to the liability of plaintiffs' attorneys for sanctions. I have also read and considered the comments on that Report submitted by the parties. I HEREBY ADOPT THE FINDINGS OF

FACT AND CONCLUSIONS OF LAW AND ACCEPT THE RECOMMENDATIONS CONTAINED THE REPORT BY MAGISTRATE BRAZIL. I find that the circumstances of this case clearly support the imposition of substantial monetary sanctions on the Pacific Legal Foundation. In addition, the Magistrate's findings of fact and conclusions of law clearly justify his issuing an order requiring attorneys Darlene Ruiz, Ronald Zumbrun, Harold Hughes, Orrin Finch, and Robert Best, to show cause why they should not be sanctioned in their individual capacities. However, I concur with the comment made by Pacific Legal Foundation in the objection filed January 29, 1990, that Ms. Ruiz may not be held liable for attorneys' fees under Rule 11 for signing the Motion to Strike referred to on page 100 of the Report, because that motion had been signed several months before the effective date of amended Rule 11, and an award of attorneys' fees is not provided for the old Rule 11.

I hereby ORDER Magistrate Brazil to commence further proceedings on the issue of the amount of the sanctions to be imposed on the Pacific Legal Foundation, and on the issue of the liability for the sanctions of the individual attorneys noted in the Report. If the Magistrate concludes that any attorney or attorneys should be sanctioned in their individual capacities, he should also make findings and recommendations with respect to the nature and degree of those sanctions.

IT IS SO ORDERED.

Dated: April 2, 1990

/s/Spencer Williams
UNITED STATES
DISTRICT COURT JUDGE

MOTION FILED
APR 19 1993

No. 92-1544

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PACIFIC LEGAL FOUNDATION,
Petitioner,
v.
PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX; JACK BOWEN MCCLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF AMERICAN FARM BUREAU FEDERATION AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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April 19, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1544

PACIFIC LEGAL FOUNDATION,
Petitioner,

v.

PAUL KAYFETZ; VICTOR AMOROSO;
DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX;
JACK BOWEN MCCLELLAN; WILLIAM NIMAN;
ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON;
and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF AMERICAN FARM BUREAU FEDERATION AND CALIFORNIA FARM BUREAU FEDERATION

American Farm Bureau Federation and California Farm Bureau Federation (collectively "Farm Bureau") respectfully move for leave to file the attached brief *amici curiae*, pursuant to Supreme Court Rule 37. Consent from Petitioner is attached hereto. Consent has been requested from Respondents. It has been denied by Respondent Bolinas Community Public Utility District, but it has neither been granted nor denied by other Respondents.

American Farm Bureau Federation is a not-for-profit, voluntary, general farm organization incorporated under the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the United States. The largest general farm organization in the country, American Farm Bureau Federation has member state organizations in all 50 states and Puerto Rico, representing the interests of more than four million member families. The American Farm Bureau Federation has brought litigation and assisted in litigation on issues of national significance and impact to agriculture.

California Farm Bureau Federation is a nongovernmental, nonprofit, voluntary membership California corporation. Its members are 53 county Farm Bureaus with a combined membership of more than 75,000 individual families in 56 California counties. California Farm Bureau Federation membership represents more than 80% of all commercial farmers in California. Its purposes include to work for the solution of the problems of the farm, the farm home, and the rural community and to represent, protect, and advance the social, economic and educational interests of the farmers in California. California Farm Bureau Federation has provided assistance to parties who choose to litigate matters which may significantly impact California's farms.

The preservation of the right to utilize the courts to correct injustices and pursue policy issues through litigation and review by the U.S. Courts of Appeals and U.S. Supreme Court are of paramount importance to the American Farm Bureau Federation and the California Farm Bureau Federation. The ability of Farm Bureau to bring litigation on behalf of its members or to support member litigation (in a nonbarratrous manner) are vital in order that Farm Bureau promote the interests of agriculture. Many agricultural issues are dependent upon the courts for resolution.

Farm Bureau members have a direct and vital interest in the preservation of the ability to pursue remedies through the courts. The Ninth Circuit's utilization of its "inherent power" to impose sanctions extends beyond the realm of caution for litigants; it sends a message to future litigants that overaggressive and perhaps tenuously founded claims will not be tolerated, but instead punished. Legal creativity, which is essential to the evolution and development of the law, will be deterred.

WHEREFORE, Applicants American Farm Bureau Federation and California Farm Bureau Federation respectfully pray that their Motion for Leave to file the attached Brief *Amici Curiae* in favor of the Writ of Certiorari be granted.

Respectfully submitted,

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* Counsel of Record

April 19, 1993

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IN THE

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PACIFIC LEGAL FOUNDATION,
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PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX; JACK BOWEN MCCLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICI CURIAE OF AMERICAN FARM BUREAU FEDERATION AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

American Farm Bureau Federation and California Farm Bureau Federation respectfully submit this brief as *amici curiae*.

Amici curiae, the American Farm Bureau Federation and California Farm Bureau Federation (collectively "Farm Bureau"), pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTEREST OF *AMICI CURIAE*

American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF has its principal offices in Park Ridge, Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in 50 states and Puerto Rico, representing more than four million member families. AFBF farm and ranch members produce virtually every kind of agricultural commodity produced commercially in the United States. The American Farm Bureau Federation has brought litigation and assisted in litigation on issues of national significance and impact to agriculture.

California Farm Bureau Federation is a nongovernmental, nonprofit, voluntary membership California corporation. Its members are 53 county Farm Bureaus with a combined membership of more than 75,000 individual families in 56 California counties. California Farm Bureau Federation membership represents more than 80% of all commercial farmers in California. Its purposes include to work for the solution of the problems of the farm, the farm home, and the rural community and to represent, protect, and advance the scoial, economic and educational interests of the farmers of California. California Farm Bureau Federation has provided assistance to parties who choose to litigate matters which may significantly impact California's farms.

The preservation of the right to utilize the courts to correct injustices and pursue policy issues through litigation and review by the U.S. Courts of Appeals and U.S. Supreme Court are of paramount importance to the American Farm Bureau Federation and the California Farm Bureau Federation. The ability of Farm Bureau to bring litigation on behalf of its members or to support

member litigation (in a nonbarratrous manner) are vital in order that Farm Bureau promote the interests of agriculture. Many agricultural issues are dependent upon the courts for resolution.

Farm Bureau members have a direct and vital interest in the preservation of the ability to pursue remedies through the courts. The Ninth Circuit's utilization of its "inherent power" to impose sanctions extends beyond the realm of caution for litigants; it sends a message to future litigants that overaggressive and tenuously founded claims will not be tolerated, but instead punished. Legal creativity, which is essential to the evolution and development of the law, will be deterred.

At the same time, Farm Bureau recognizes that the court system is not to be abused. The sanctity and decorum of the courts are to be preserved. However, decisions which infuse a reluctance on potential litigants due to overzealous application of the inherent power doctrine must be remedied by this Court. The decision below threatens the right to litigate and be properly heard. It is necessary that this Court further define guidelines for the implementation of the inherent powers of a court.

STATEMENT OF THE CASE

The case is as stated by the Petitioner.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT COURT OF APPEALS ERRONEOUSLY APPLIED THE INHERENT POWERS DOCTRINE TO THE FACTS OF THIS CASE ESPECIALLY BY APPLYING THE DOCTRINE TO A NON-PARTY TO THE LITIGATION

It is generally acknowledged that the courts have a power, inherent power, to impose sanctions which are necessary for a court to dispense in order for "courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*,

370 U.S. 626, 82 S.Ct. 1386 (1962). See also *Van Sickle v. Holloway*, 791 F.2d 1431 (10th Cir. 1986). Such "inherent powers must be exercised with restraint and discretion." *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123 (1991). Yet none of the cases cited by the Ninth Circuit nor those cited in *Chambers v. Nasco, supra,* extended the inherent powers of the court to implementation of sanctions over parties who were not attorneys in the litigation or parties to the suit.

It is unprecedented for a court as did the Ninth Circuit Court of Appeals, to reach beyond the confines of the case itself and impose sanctions against neither attorney nor a party merely because of an *ex parte* finding that the facts warranted such. This is contrary to *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877) where this Court early on determined that due process required that a court not exert authority over an individual unless it had the power to reach the individual. Due process has always required "traditional notions of fair play and substantial justice," *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2659, 53 L.Ed.2d 683 (1977), before a court can exert its jurisdiction over an individual. See also *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. (1945).

It is the properly accomplished service of process which confers jurisdiction on an individual to adjudicate its rights. *F.T.C. v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300 (D.C. Circuit 1980). The record does not indicate that service of process was ever accomplished on Petitioner.[1] The question precedes one of a valid service of process: it is a question of adjudica-

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[1] Petitioner's Petition For A Writ Of Certiorari indicates on page 13 that it never submitted to the jurisdiction of the District Court. It only appeared to defend itself against the sanctions and consistently argued that the District Court lacked *in personam* jurisdiction. Petitioner in this Brief refers to Pacific Legal Foundation (PLF).

tion of sanctions without any service of process on the sanctioned Petitioner.[2]

The question before the Court is not whether *in personam* jurisdiction over Petitioner exists; it is whether Petitioner can be sanctioned without effect of *in personam* jurisdiction through service of process. Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 were rejected. Either could have been imposed over attorneys or parties to the suit. The District Court and the Circuit Court broadly reached out to one not on record as an attorney or a party and imposed sanctions pursuant to the "inherent powers" doctrine. Such sanctions were imposed on one not before the court pursuant to a summons, subpoena, or warrant. Such conduct by a court goes beyond "fair play and substantial justice." *F.T.C. v. Compagnie De Saint-Gobain-Pont-A-Mousson, supra.* Such abuse of inherent power must be considered by this Court. *Chambers v. Nasco, Inc., supra,* which was relied on by the Ninth Circuit, required a court to comply "with the mandates of due process" when invoking its inherent power.

II. THE NINTH CIRCUIT COURT OF APPEALS HAD SUFFICIENT MEANS TO IMPOSE SANCTIONS WITHOUT USE OF INHERENT POWERS

Even if the issue of whether Petitioner was subject to the court's *in personam* jurisdiction is open to debate, it is quite clear that Petitioner was not a named plaintiff in the underlying litigation, neither was Petitioner acting as a law firm representing the plaintiffs in the underlying litigation as the Ninth Circuit concedes, *Lockary v. Kayfetz,* 974 F.2d 1166, 1170 n.2 (9th Cir. 1992).

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[2] The protracted litigation which resulted in *Harris v. Marsh,* 679 F. Supp. 1204 (E.D.N.C. 1987), *Blue v. U.S. Depart. Of Army,* 914 F.2d 525 (4th Cir. 1990), and others, indicated that the NAACP Legal Defense Fund was also a party of record in those proceedings. The lower court's order reversed by the Fourth Circuit at least apparently was not further tarnished by the District Court not having the sanctioned party before it as a party to the proceedings.

Expansion of the court's sanctioning power to an entity who is neither a named party nor a representative of a party raises significant concern to organizations like Farm Bureau who may offer legal, financial or expert assistance in a court proceeding to further members' interests. Significant assistance may be given without official participation and without any real ability to control the course of proceedings. An extension of the sanctioning authority may impede the ability to protect valuable rights.

In assessing a court's power to sanction, the Ninth Circuit focused on *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed. 438 (1989) and *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123. Although the two cases appear to arrive at different conclusions regarding a court's use of inherent power to extend sanctions beyond delineated federal statutes or rules, both cases stress the risk of venturing outside the confines of legislatively enacted rules. The decision by the Ninth Circuit to uphold sanctions against Petitioner warrants review to demonstrate the error in reaching out with inherent power when the sanctity of judicial proceedings could have been maintained through existing rules and statutes.[3] It is appropriate to analyze the extension of authority to sanction because Petitioner does not fall neatly into the categories of entities sanctioned as outlined in *Pavelic*, a law firm, or *Chambers*, a party. It is essential to review the reason for focusing on Petitioner as the entity to be sanctioned, rather than the individual attorneys who prepared and submitted court documents on behalf of the plaintiffs.

Farm Bureau, who may elect to participate in litigation to further its members' interests, is by necessity dependent upon the attorneys who participate in court proceedings. The organization, managed by non-attorneys, is not competent to make an institutional judgment as to how

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[3] Fed. R. Civ. P. 11 and 280 U.S.C. § 1927 were the appropriate means of imposing sanctions.

far existing law may be stretched or the appropriateness of filings. The responsible attorneys must remain accountable for making legal determinations, as should have been the case for Petitioner. It is appropriate that responsibility for any conduct outside acceptable boundaries be limited to parties or representatives who possess appropriate authority. If the Ninth Circuit's interpretation of the manner in which sanctions are imposed is allowed to stand, organizations will be reluctant to expose their members to the financial risk of sanctions, as a result valuable rights may go unchampioned.

CONCLUSION

It is incumbent upon this Court to review extreme abuses by lower courts. In the instant case the District Court and the Circuit Court elevated inherent powers to a level of plenipotentiary power of the court. The courts are to correct disregard for due process and the traditional rules of fair play, not impose them. If the dignity of the courts is to be preserved, it is necessary that this Court review the Ninth Circuit decision in order that proper guidelines for administration of the inherent powers of a court be established.

We submit that the issues presented are of such importance that they should be considered by this Court. For these reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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April 19, 1993

MOTION FILED

APR 19 1993

No. 92-1544

In The

Supreme Court of the United States

October Term, 1992

PACIFIC LEGAL FOUNDATION,

Petitioner,

v.

PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX; JACK BOWEN MCCLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; AND BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NEW ENGLAND LEGAL FOUNDATION and ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 36.1 of the Rules of the Supreme Court, the New England Legal Foundation ("NELF") and the Atlantic Legal Foundation ("ALF") move this Court for leave to file its brief amicus curiae (bound with this motion) in support of the petition for writ of certiorari.

NELF is a not-for-profit public interest legal organization. Since its founding in 1977, NELF's mission has been to use litigation to promote free market values and to protect the economic rights and freedoms of New England's citizens. NELF locates and litigates, without charging a fee, precedent-setting cases involving individual and corporate economic and property rights and unconstitutional or illegal government regulation of economic activity. NELF is funded by tax-deductible contributions from businesses, charitable foundations and individuals.

ALF is a public interest law organization whose mandate is to present balanced articulation of the public interest in cases that involve issues of law that are likely to have broad impact beyond the interests of the particular litigants, or that have public policy implications or are of significance in the development of principles of constitutional law. ALF has appeared before this Court, lower federal courts in several circuits, and state courts in many states as counsel for parties, intervenors, and amici in numerous cases involving issues of public interest, public policy and constitutional law. ALF represents individuals, civic and business organizations, small businesses, and on rare occasion, sizeable enterprises, in litigation, always without charging legal fees.

Because, like Petitioner Pacific Legal Foundation, NELF and ALF are engaged in litigating novel of theories of law which often depend for their success on persuading the courts to change prior law, Amici fear that the decision below, if allowed to stand, will create a risk that they, too, could be sanctioned for activities which are fully protected by the First Amendment.

NELF and ALF have requested the consent of the parties to the filing of their amicus brief in support of the petition for certiorari. The Petitioner, Pacific Legal Foundation, has consented, as evidenced by the letter from its counsel, Sidley & Austin, attached to the filing letter enclosed herewith. The Respondents have declined to give its consent.

Amici believes that it will present arguments in favor of granting certiorari which will not be presented by the parties to this action. Amici offer a broader perspective as to how the decision of the courts below will affect the practice of public interest law and the First Amendment rights of non-profit public interest organizations engaged in law reform litigation.

For the foregoing reasons, NELF and ALF pray that this Court grant their motion for leave to file the accompanying brief *amici curiae*.

DATED: Boston, Massachusetts: April 19, 1993.

Respectfully submitted,
New England Legal Foundation
By its attorneys,

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INTEREST OF AMICI

The New England Legal Foundation ("NELF")is a not-for-profit public interest legal organization. Since its founding in 1977, NELF's mission has been to use litigation to promote free market values and to protect the economic rights and freedoms of New England's citizens. NELF locates and litigates, without charging a fee, precedent-setting cases involving individual and corporate economic and property rights and unconstitutional or illegal government regulation of economic activity. NELF is funded by tax-deductible contributions from businesses, charitable foundations and individuals.

The Atlantic Legal Foundation ("(ALF") is a public interest law organization whose mandate is to present balanced articulation of the public interest in cases that involve issues of law that are likely to have broad impact beyond the interests of the particular litigants, or that have public policy implications or are of significance in the development of principles of constitutional law. ALF has appeared before this Court, lower federal courts in several circuits, and state courts in many states as counsel for parties, intervenors, and amici in numerous cases involving issues of public interest, public policy and constitutional law. ALF represents individuals, civic and business organizations, small businesses, and on rare occasion sizeable enterprises, in litigation, always without charging legal fees.

Because, like Petitioner Pacific Legal Foundation ("PLF"), NELF and ALF are engaged in litigating novel of theories of law which often depend for their success on persuading the courts to change prior law, Amici fear that the decision below, if allowed to stand, will create a risk that they, too, as well as many other public interest organizations, could be sanctioned for activities which are fully protected by the First Amendment. Even the prospect of sanctions chills the exercise of their First Amendment rights.

Pursuant to Supreme Court Rule 37.2, NELF and ALF have obtained consent for the filing of this amicus brief from counsel for the Petitioner. Counsel for the Respondents has not consented, so a motion for leave to file this brief has been filed herewith.

STATEMENT OF THE CASE

Amici accept and adopt the Petitioner's Statement of the Case.[1]

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[1]Amici take no position on the specifics of the actions for which PLF was sanctioned. Amici's knowledge of the facts of this action is limited to the discussions contained in the Petition and Appendix. Accordingly, Amici are unable to take any position as to whether the conduct of PLF's

(continued...)

SUMMARY OF ARGUMENT

The issue of national importance at stake in this case is in what circumstances a trial court may resort to vaguely defined "inherent powers" to sanction alleged misconduct by a public interest law foundation in the conduct of public interest litigation concerning constitutional rights. Such litigation is political speech fully protected by the First Amendment against the chilling effect of vague and overbroad governmental action, including judicially imposed sanctions. A court should use its "inherent powers" only after finding that more precisely defined rules and statutes are inadequate due to an attorney's or a party's bad faith tactics. In this case, even if there were genuine misconduct, the court could have completely resolved the matter by applying Fed. R. Civ. P. 11 and 28 U.S.C. §1927. Unless reversed, the decision below will have a chilling effect on the efforts of many non-profit public interest law organizations, including Amici, to mount novel and difficult legal challenges to government action that threatens the rights of Americans.

REASONS FOR GRANTING THE WRIT

I. FIRST AMENDMENT PRINCIPLES REQUIRE A COURT TO APPLY SPECIFIC RULES BEFORE RESORTING TO VAGUE "INHERENT POWERS" TO SANCTION A NON-PROFIT ORGANIZATION LITIGATING A PUBLIC INTEREST CASE.

A. *Public Interest Litigation is Political Speech Protected by the First Amendment.*

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[1](...continued)
attorney-employees was sanctionable. Amici contend that, even assuming arguendo the correctness of the findings of the magistrate and trial court, the courts below committed reversible error by applying the wrong legal principles to those facts.

It is well-established that public interest litigation engaged in by a non-profit law organization seeking to develop or change the law and to protect constitutional rights is political speech entitled to the full protection of the First Amendment. For public interest organizations like the ACLU, the NAACP, PLF[2] and Amici, "'litigation is not a technique of resolving private differences'; it is 'a form of political expression and political association.'" *In re Primus*, 436 U.S. 412, 428 (1978), *citing NAACP v. Button*, 371 U.S. 415, 429, 431 (1963). "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."[3] *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585 (1971).

B. *The Government Can Restrict Public Interest Litigation Only by Specific Regulations Tightly Focused on Misconduct Unprotected by the Constitution.*

Because non-profit public interest litigation is political speech, it can be regulated only by precise rules that are much more narrowly directed to sanctionable conduct than is required for regulation of commercial litigation. "Where political expression or association is at issue this Court has not tolerated the degree of

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[2]PLF's attorneys have represented parties in many cases that involved novel theories of law, or required extension or elaboration of principles of constitutional law, or required creative and tenacious advocacy. Two cases of note which have reached this Court in recent years in which PLF attorneys argued successfully for a party challenging governmental action are *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Keller v. State Bar of California*, 496 U.S. 1 (1990).

[3]Collective litigation activity is equally protected whether the rights sought arise under the Equal Protection Clause or under the Takings Clause. *See Button*, 371 U.S. at 440, n. 19 (citing activities of National Lawyers Committee, a group created to litigate challenges to economic regulations as precedent for First Amendment protection of NAACP's right to litigate equal protection claims).

imprecision that often characterizes government regulation of the conduct of commercial affairs." *Primus*, 436 U.S. at 434, *distinguishing Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). Rather, "standards of permissible statutory vagueness are strict in the area of free expression." *Button*, 371 U.S. at 432. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433.

This strict rule of precision is intended to avoid the chilling effect on protected political speech which would occur if speakers feared being penalized for speaking out in ways that might or might not violate vaguely defined standards. "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect," *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977), of, e.g., six-figure sanctions imposed under a court's undefined inherent powers. Commercial speech, by contrast, is not "particularly susceptible to being crushed by overbroad regulation," *Id.* at 381, and so can be subjected to broad prophylactic rules. *See Ohralik*, 436 U.S. at 455-456, 458-459.

C. *A Court Should Use Its "Inherent Powers" to Sanction Misconduct in Public Interest Litigation Only as a Last Resort.*

This Court has recognized that a court has "inherent powers" to sanction misconduct in some circumstances. The scope of these powers, which "necessarily result to our Courts of justice from the nature of their institution," *U.S. v. Hudson*, 7 Cranch (11 U.S.) 32, 34 (1812), has never been delimited, although this Court has given some examples. *See Chambers v. NASCO*, 501 U.S. ---, 111 S.Ct. 2123, 115 L.Ed. 2d 27, 44-45 (1991). Indeed, a court's inherent powers necessarily elude clear definition since they include the reserve power to deal with extraordinary circumstances not covered by express rules. Merely saying that attorneys, parties, and perhaps unspecified other persons (such as PLF), must do nothing potential-

ly sanctionable under a court's "inherent powers" provides only a vague standard of conduct as compared to Rule 11 and §1927.

Rule 11 lays out a clearer, objective standard of reasonable inquiry. As this Court has pointed out, "Rule 11 was amended . . . precisely because the subjective bad-faith standard was difficult to establish." *Chambers*, 501 U.S. at --- n.11, 111 S.Ct. at 2133, 115 L.Ed. 2d at 46 (1991). Rule 11, which the trial court did not find applicable in this case, specifically is "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." Notes of Advisory Comm. on Rules, Federal Civil Judicial Procedure and Rules 36 (West, 1991). By contrast, the threat of sanctions under the court's inherent powers will likely have such an inhibitory effect on legal innovation because it is so difficult for attorneys to know in advance what is proscribed.

This Court has repeatedly stressed that "because of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. ---, 111 S.Ct. at 2133, 115 L.Ed. 2d at 45 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). Even as to commercial litigation, a court usually should apply sanctions under Rule 11 before resorting to its broader but vaguer inherent powers.

> [W]hen there is bad faith conduct in the course of litigation that could be adequately sanctioned under the rules, the court ordinarily should rely on the rules rather than the inherent power.

Chambers, 501 U.S. at ---, 111 S.Ct. at 2136, 115 L.Ed. 2d at 48. This follows from the principle that "inherent powers of federal courts are those which are *necessary* to the exercise of all others." *Roadway Express*, 447 U.S. at 764 (emphasis added). Where the court can apply power flowing from a specific rule such as Rule 11 or a statute such as §1927, the exercise of its inherent power is not "necessary." In *Chambers*, the sanctioned party in ordinary commercial litigation engaged in complex maneuvers both in and out of court that deliberately "emasculated and frustrated the purposes

of these rules and powers of the District Court." 111 S.Ct. at 2128, 115 L.Ed.2d at 39. In that context of deliberately evasive and malicious behavior this Court ruled that the court could resort directly to its inherent power because the full range of misconduct in and out of the courtroom could not be reached by Rule 11 and §1927. *Id.*, 111 S.Ct. at 2136, 115 L. Ed. 2d at 48-49. In such circumstances, it would waste judicial resources to first apply Rule 11 and §1927 to "discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct." *Id.*

A fortiori, when a court is supervising public interest litigation, First Amendment principles require that it rigorously adhere to the priority of specific Rule 11 and §1927 over general inherent power. "Broad prophylactic rules in the area of free expression are suspect. [Citations omitted.] Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Button*, 371 U.S. at 438. *Accord*, *Primus*, 436 U.S. at 434. While in ordinary commercial litigation such as *Chambers*, the profit motive provides some insulation against chilling effects of a court's invocation of its inherent powers, *see Chambers*, 501 U.S. at --- n. 11, 111 S.Ct. at 2133, 115 L.Ed. 2d at, 46, the chill is real in public interest litigation such as the instant case. *See, id.* 111 S.Ct. at 2145, 115 L. Ed. 2d at 60 (Kennedy, J. dissenting) (standardless and unchecked judicial power could be applied to chill rights of advocacy); *see Bates*, 433 U.S. at 383 ("since the advertiser . . . has a commercial interest . . . we have little worry that regulation to assure truthfulness will discourage protected speech"); *compare Primus*, 436 U.S. at 434, *with Ohralik* 436 U.S. at 458. In public interest litigation, the application of the court's inherent powers must be tested against the most stringent First Amendment standards.

Amici recognize, of course, that the court's inherent powers continue to be available in the extraordinary case to "fill in the interstices" of more specific rules. *Chambers*, 111 S.Ct. at 2134, 115 L.Ed. 2d at 46. Only if and after Rule 11 and §1927 are found to be inadequate to control abusive litigation conducted in bad faith can a court decide to resort to its "ultimate weapon" -- its inherent powers -- to control attorneys and parties who, like Mr. Chambers,

deliberately and in bad faith engage in a pattern of conduct designed to "emasculate" the court's other powers. *See Chambers*, 111 S.Ct. at 2138, 115 L.Ed. 2d at 39. No one should fear "chilling" the inclination to engage in such improper activities.

Given the unavoidable vagueness of inherent powers, which can reach misconduct not subject to Rule 11 or §1927, fairness and the First Amendment require that the court sanction someone using its inherent powers only *after* first warning him that if he persists in specifically defined bad faith misconduct he will be sanctioned. Where political speech is concerned, it would not be enough for a court merely to threaten that past conduct may be sanctioned at the end of the litigation or to threaten to sanction any future misconduct within the reach of its inherent powers.

"Non-profit, public interest litigation" is, of course, not a mantra that protects abusive litigation from all sanctions. A frivolous and abusive "public interest" suit is sanctionable if it is actually brought for a "malicious purpose or 'for private gain serving no public interest,'" *Primus*, 436 U.S. at 437, *citing Button*, 371 U.S. at 440. A useful analogy is *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964), where this Court quoted James Madison's statement that "the censorial power is in the people over the Government and not in the Government over the people." *Id.* at 282. The same principle should apply whether a citizen's criticism of government officials is expressed in a newspaper or a court. In *New York Times*, this Court ruled that a person criticizing a public official concerning official conduct is liable only if "the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not". Where the defendant is a corporate entity, it can be held liable only if the individuals who decided to publish did so with actual malice. *Id.* at 287. So, too, in the context of litigation, a person should not be penalized unless the court makes a specific finding of "actual malice": knowingly and in bad faith filing a false complaint or other pleading which evades control by Rule 11 or §1927.

D. *The Misconduct Alleged in this Case was Attorney Misconduct Which Could Have Been Sanctioned Under Rule 11 and 28 U.S.C. §1927.*

There is no dispute that Petitioner PLF is a non-profit public interest organization. Nor is there any dispute that in the underlying case it was assisting individuals to litigate claims that their constitutional rights were being violated. There is no evidence in the record that PLF was motivated by any commercial or selfish interest whatsoever. Even assuming, arguendo, that PLF was subject to the jurisdiction of the District Court at all,[4] the sanctions imposed on PLF must be tested against the First Amendment's rules for protection of political speech. The District Court below erred in three respects when it resorted to its inherent powers without first using Rule 11 or §1927.

First, the courts below applied an excessively vague standard when it exercised its inherent powers. It is not sanctions *per se* that chill legitimate public interest litigation, but rather the impossibility of knowing what conduct ultimately will be sanctioned. The courts below made no finding that the underlying suit was brought for a "malicious purpose or 'for private gain serving no public interest,'" *Primus*, 436 U.S. at 437 *citing Button*, 371 U.S. at 440. To the contrary, the District Court did not find that any of the plaintiffs who brought the case deserved to be sanctioned. The Ninth Circuit found that there was some merit to the suit. *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990) (reprinted as App. H. to Petition); A. A-19-A-20. Although the District Court warned counsel that if the action proved to be frivolous in whole or in part, the court would make someone pay for the defendant's time and resources, A. C-22, there appears to have been no prior warning to PLF that it would be sanctioned

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[4]PLF's petition for certiorari points out in detail why PLF, which was neither an attorney nor a party, was neither subject to the court's inherent power nor within its *in personam* jurisdiction. Amici have nothing to add to that discussion.

under the court's inherent powers if it persisted in specifically defined misconduct. The decisions below thus rest entirely on *ad hoc* and *post hoc* determinations that bad acts occurred, a result that offers no guidance to attorneys who wish to evaluate their future conduct against the possibility of sanctions.

Second, the Ninth Circuit apparently would not have held PLF itself sanctionable but for PLF's protected First Amendment activities. That court ruled that PLF could be sanctioned for the alleged misconduct because it believed that PLF, acting through its employees, contacted and organized the plaintiffs, A. A-6; funded the litigation to "establish a legal precedent," A. A-13; and provided attorneys for merely "nominal" plaintiffs, A. A-12-13.[5] But soliciting clients and litigating their claims to establish a general precedent are activities fully protected by the First Amendment. *Button*; *Primus*.

Third, avoiding an unconstitutional chill of protected political speech required the District Court to expend the time and effort to first apply the more precise standards of Rule 11 and §1927. Had it done so, it would have realized that, even if misconduct occurred below, each allegedly sanctionable act was an act of an attorney that could have been sanctioned under Rule 11 or §1927 or both. For all but one of the matters for which the Circuit Court imposed sanctions, the magistrate appointed as special master found that at least one individual attorney could have been sanctioned under 28 U.S.C. §1927. A. C-104-06. As to the remaining matter (the inverse condemnation claims of Mesa Ranch and Holter), the

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[5]Contrary to the implication that the plaintiffs had no real stake in the case, the plaintiffs undisputedly did have enough of a stake to have standing and to give the courts Article III jurisdiction to decide the case on the merits. *See Lockary v. Kayfetz*, 917 F.2d 1150 (App. H). The Ninth Circuit itself notes that the plaintiffs alleged that the challenged action of the Defendants prevented them from using valuable real property, A-6, an allegation which certainly gave them a substantial constitutional claim, *see Lucas v. South Carolina Coastal Commission*, --- U.S. ---, 112 S.Ct. 2286 (1992).

master based his conclusion entirely on pleadings filed and signed by individual attorneys named in his report. A. C-56-61. If these documents were as misleading as the master believed, then the attorneys who signed them could have been sanctioned under Rule 11. Yet neither the master nor the District Court ever applied Rule 11 to this supposed misconduct before resorting to the court's sweeping inherent powers. In short, this is not a case in which, because "neither the statute nor the rules are up to the task," the court may fall back on its inherent power.[6] *See Chambers*, 501 U.S. at ---, 111 S.Ct. at 2136, 115 L.Ed. 2d at 48-49.

It is not enough that a sanctioning court recite that public interest advocacy is constitutionally protected and should not be chilled, as did the Ninth Circuit, A. A-14, if the court then proceeds to levy chilling sanctions grounded on an organization's having engaged in such advocacy. *See Button*, 371 U.S. at 437-438. "This Court's duty is not limited to the elaboration of constitutional principles; [it] must also in proper cases review the evidence to make certain that those principles can be constitutionally applied." *Primus*, 436 U.S. at 434 *quoting New York Times v. Sullivan*, 376 U.S. at 285. *Accord*, *Ohralik*, 436 U.S. at 463 (this Court will make independent review of record). [7]

---

[6]Even supposing that PLF as an entity could be subject to sanctions for specific misconduct in the course of the litigation, PLF could have been sanctioned only if the individual attorneys who made its strategic decisions themselves acted with "actual malice," i.e. only if they filed papers which they knew or should have known were false. *See New York Times v. Sullivan*. If that were so, then the court could have resolved the matter by sanctioning the attorneys personally under Rule 11 or §1927 with no need to use its inherent powers.

[7]The record concerning the sanction arising from the plaintiffs' antitrust claim may deserve such review. The magistrate below initially proposed that PLF be sanctioned for bringing an entirely frivolous suit; when the Ninth Circuit held that plaintiffs were entitled to a trial on the merits of some of their claims, *Lockary v. Kayfetz*, 917 F.2d at 1157, A. H-14, the

(continued...)

The decision below should be reversed and the trial court directed to apply a precise rule that safeguards First Amendment principles: namely, that the court not exercise its inherent powers unless it first apply Rule 11 and §1927 to all actions which may be subject to those specific provisions and then only use its inherent powers as to conduct which was clearly defined in a prior warning and was malicious and in bad faith.

II. UNLESS REVERSED, THE DECISION BELOW WILL HAVE A CHILLING EFFECT ON PUBLIC INTEREST LITIGATION NATIONWIDE.

Despite the lip service that the courts below paid to this Court's First Amendment precedents, Amici fear that unless the decision below is reversed it will inhibit robust public interest litigation throughout the country.

The Ninth Circuit decision in effect establishes a rule that sanctions can be imposed on an organization if it allegedly recruits plaintiffs and funds litigation to make new law on an issue of broad public importance and if misconduct allegedly occurs in the course of that litigation. Such a rule, although facially neutral as between public interest organizations and private for-profit law firms, actually would have a much more severe impact on public interest organizations. Public interest organizations are much more likely to recruit clients who have small stakes in a major public issue; who lack sufficient resources to pay substantial legal fees; who require the organization's assistance in funding the litigation; and whose claims depend on novel legal theories too risky for private

---

[7](...continued)
magistrate fell back on alternative theories, including a proposal to sanction PLF for bringing the antitrust claims, which were rejected on the merits as contrary to established precedents, A. A-21. Petition at 4, A. M-6-M-10. The Ninth Circuit upheld the sanction for bringing the antitrust claim, apparently because it concluded that PLF should have known that there was no basis for them.

attorneys to advance in contingency fee cases.

As this court's decision in *Button*, 371 U.S. at 433, acknowledges, public interest organizations, which typically get no financial reward even if they win,[8] will be relatively easily inhibited. Such organizations are motivated to bring cases by their hope to advance the law and their view of the public interest. However fierce a foundation's dedication to principle, in the real world the prospect that it could be betting its life on the outcome of a single case will necessarily be a significant deterrent. The deterrent effect of a single huge sanction, such as PLF has suffered, will extend beyond that specific case to engender fear in other organizations considering bringing many other cases. The First Amendment freedoms of organizations like NAACP, PLF and the Amici "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *Button*, 371 U.S. at 433. *Compare Bates*, 433 U.S. at 380-81 (commercial litigation and advertising by for-profit firms not as susceptible to chill as political litigation is).

Amici NELF and ALF and their attorneys recognize and abide by their clear obligations under Rule 11 and §1927, but they fear that their First Amendment rights will be chilled if the Ninth Circuit's decision is allowed to stand as a precedent for sweeping use of "inherent powers" in their parts of the country. NELF and ALF often raise claims that require changing prior law to prevail. Their willingness to bring such suits would be inhibited if they had to worry about the crushing impact of heavy sanctions every time they plead a novel theory and vigorously advocate their clients' rights. And if firms like NELF and ALF, NAACP and ACLU, are silenced, ultimately it will be the public at large that will suffer a loss of their constitutional rights.

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[8]A non-profit public interest law firm does not lose the full protection of the First Amendment if it is sometimes awarded attorneys' fees by the court under, e.g. 42 U.S.C. §1988, or if contributions to the firm rise when it wins a case. *Primus*, 436 U.S. at 429-431.

CONCLUSION

For the reasons stated above, Amici the New England Legal Foundation and the Atlantic Legal Foundation respectfully request this Court to grant the petition for writ of certiorari and reverse the decision of the Ninth Circuit.

DATED: Boston, Massachusetts: April 19, 1993.

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No. 92-1544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PACIFIC LEGAL FOUNDATION,

Petitioner,

v.

PAUL KAYFETZ, *et al,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The NAACP Legal Defense and Educational Fund, Inc., and the Mexican American Legal Defense and Educational Fund move the Court for leave to file the attached brief *amici curiae* in support of the grant of a writ of certiorari in the present case.[1] The motion for leave to file states the interest of *amici*.

[1]The Petitioner has consented to the filing of the attached brief, but respondent has refused consent.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation that was established for the purpose of assisting black citizens in securing their constitutional and civil rights. It was established in 1940 as a legal aid society under the laws of the state of New York, and is one of the oldest public interest legal organizations in the United States. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963).

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a non-profit national civil rights organization headquartered in Los Angeles. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States

As public interest legal organizations LDF and MALDEF have a deep concern with the use of a federal court's "inherent power" to impose sanctions on organizations seeking to carry out the Congressional policy of private enforcement of the civil rights laws and other laws impacting on the public interest. Further, we are concerned with the use of the sanctioning power on plaintiffs and private counsel who seek to vindicate their rights in federal court.

We believe our long experience as public interest organizations will be of assistance to the Court in deciding whether to grant certiorari in this case. Therefore, we pray

The American Center for Law and Justice, a nonprofit corporation which sponsors pro-family and pro-liberty litigation in the public interest, joins this motion and brief.

that leave be granted to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari.

Respectfully submitted,

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ARGUMENT

THE DECISION BELOW RAISES IMPORTANT QUESTIONS CONCERNING THE SCOPE AND MEANING OF THIS COURT'S DECISION IN CHAMBERS V. NASCO, INC.

I.

Amici believe that review of the Ninth Circuit's decision is particularly important because of the basis on which that court justified the use of "inherent authority" to impose sanctions on a not-for-profit public interest legal

organization that was supporting litigation. The decision below was founded on assumptions about the manner in which such an organization functions that are, with all due respect, not accurate. These assumptions were the basis of the holding that the district court had the authority to impose sanctions on the Pacific Legal Foundation even though the foundation was not subject to Rule 11, F.R.Civ. Proc., 28 U.S.C. § 1927, or any other rule or statute that provided for the imposition of sanctions.

Thus, the court below cited the acknowledgement of Pacific Legal Foundation in its appellate brief that it seeks "to participate in precedent setting litigation in the public interest" as inconsistent with the Foundation's position that it was furnishing counsel to plaintiffs who could not otherwise afford to bring suit. The court held that because the Foundation's goal was to "establish a legal precedent" the plaintiffs were merely "nominal" and "were merely pawns or puppets in this effort." *Lockary v. Kayfetz*, 974 F.2d 1166, 1171 (9th Cir. 1992).

Amici urge that the fact that an organization has as one, or even a primary goal, the establishment of precedent does not in any way lead to the conclusion that the plaintiffs in the lawsuits it supports are either nominal or "pawns or puppets." Organizations such as the Foundation and *amici* are limited in resources. They cannot serve as general legal aid providers and represent everyone who seeks their services, even if the cases are within the scope of their purposes and expertise. They are necessarily selective, and attempt to choose those cases that will have the greatest impact either in terms of establishing precedent that can then be used by others in similar circumstances, or by bringing actions that will in themselves affect many persons. The ideal case, of course, is one that accomplishes both purposes.[1]

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[1]Thus, an employment discrimination case brought as a class action on behalf of a large group of workers at a particular plant can both directly benefit the plaintiffs and establish a precedent that can

In either event, the interests of the real people with real claims on whose behalf actions are brought are not only central but, properly, paramount. Attorneys who work for public interest organizations are fully aware of their ethical obligations to represent the interests of their clients, and do not subordinate them to the dictates of "a higher cause." While the decision whether or not to take a case in the first instance may be dictated by whether that case, among many other possible cases, is compatible with and will further the objectives of the organization, once representation has been assumed, litigation decisions are made based on whether the interests of the clients will be served.

For example, it is not uncommon that a case that was taken as a vehicle for the vindication of a legal principle, will result in a settlement that provides appropriate relief for the plaintiffs. Organizations such as *amici* fully understand that if such is the case, the settlement must be presented to their clients and accepted on their behalf if that is their decision. This is mandated not only by ethical standards, but also, in the case of class actions, by the requirements of Rule 23, F.R. Civ. Proc.

Of course, disagreements between public interest lawyers and their clients may arise, just as they arise between any other lawyers and their clients. If conflicts do arise, they must and are resolved consistent with the ethical obligations of the lawyers, and there are instances in which a public interest legal organization may have to seek to be relieved as counsel if the differences are irreconcilable. Although, in the experience of *amici*, such instances are rare, they have occurred in the many years of the our work.

Thus, certiorari should be granted to make clear the extent to which, if any, the fact that an organization supports litigation that is consistent with its purposes is a proper basis

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benefit large numbers of other persons. Two examples from the work of LDF are *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

for holding that it can be sanctioned for abuses that occur during the course of the litigation. The activities of such organizations have long been held to be protected by the first amendment. *NAACP v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978). The decision of the Ninth Circuit has grave implications for the ability of such organizations to carry out constitutionally protected activities free of the chilling effect of the danger of the imposition of sanctions based on pre-conceived notions of their role in supporting litigation.

II.

Certiorari should also be granted in the present case because it presents an opportunity for the Court to deal with a broader issue of great importance for the guidance of the lower courts, the proper application of the decision in *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123 (1991). In *Chambers* this Court affirmed the use of inherent powers to sanction a party before the district court for actions taken by that party in and out of court with the intent of impeding or directly disobeying the rulings and orders of the court, such out-of-court actions not being within the reach of the terms of the various fees acts, Rule 11, section 1927, or other bases for imposing sanctions. Rather than applying *Chambers* to comparable factual situations, in a number of instances the lower courts have extended *Chambers* far beyond its appropriate reach.

Thus, *Chambers* involved a party who was responsible for litigation carried out for abusive purposes and for out-of-court actions designed to undermine the district court's jurisdiction. The award of sanctions was based on record-based factual findings that established responsibility for the sanctioned actions. In the present case, on the other hand, the sanctions were based on assumptions that formed the predicate for a holding that the named plaintiffs were not the real parties in interest, but that rather an organization that supported the litigation was. Moreover, the present

case involves alleged improper litigation conduct that occured entirely in court, all of which could ahve been reached through Rule 11 or section 1927. Yet the district court resorted to the use of inherent power.

Another case that involves an unwarranted extension of *Chambers* is *Sassower v. Fields*, No. 92-1405, *cert. denied*, April 19, 1993. In that case, the court of appeals first held that fee shifting was not proper under the fee provision of the Fair Housing Act, that sanctions were not proper under Rule 11 and only partly proper under section 1927, but then affirmed the entire award of sanctions under the authority of *Chambers*. The present case and *Sassower*, *amici* submit, are indicative of a growing trend to undermine the American Rule as explicated in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), by swallowing it up through the over-expansion of exceptions to it. We urge that it is essential that the Court provide guidance to the lower federal courts as to the proper scope and meaning of *Chambers v. Nasco, supra*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1992

PACIFIC LEGAL FOUNDATION,
Petitioner,

v.

PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX; JACK BOWEN MCCLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

Respondents' lengthy brief in opposition to certiorari is striking primarily for what it does not dispute. Respondents do not deny that, like the lower court decisions reviewed in *Missouri* v. *Jenkins*, 495 U.S. 33 (1990), *Spallone* v. *United States*, 493 U.S. 265 (1990), and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 230 (1992) (granting certiorari), the Ninth Circuit's decision below authorizes an enormous expansion of the "inherent power" of federal district courts—in this case the power to impose sanctions arising from an attorney's litigating behavior upon an entity that is neither a party nor an attorney. See Pet. 8-13. Respondents cite no other decisions recognizing such a power. Respondents also do not deny that, during the proceedings before the district court, petitioner was never named as a party to the litigation or served with legal process—the usual means by which a district court obtains *in personam* jurisdiction. See Pet. 13-14.

Nor do respondents dispute that this case is of immense practical importance to the public-interest legal community. See Pet. 15-18. Indeed, respondents do not even address the enormous and troubling impact of the decision below on the complex relationship among public interest organizations, their employees, and the people they seek to serve—matters addressed at greater length in the briefs *amici curiae* filed by the NAACP and Mexican-American Legal Defense and Educational Funds (at 2-4); by the American and California Farm Bureau Federations (at 6-7); by the New England and Atlantic Legal Foundations (at 12-13); and by the Mountain States Legal Foundation (at 11-13).[1]

[1] While respondents quibble over the impact the Ninth Circuit's ruling likely would have had on the conduct of *this* litigation (opp. 17-18), they do not dispute that the decision below will compel public-interest organizations generally to micro manage any

1. Nothing in respondents' submission casts any doubt on the need to resolve the first question presented in the petition.

First, respondents' principal argument—that the courts below did, in fact, find the imposition of sanctions on petitioner to be "necessary" (Opp. at 8)—rests upon a misreading of this Court's inherent power decisions. Petitioner will gladly concede (see Pet. 9-10) that the courts below believed the imposition of sanctions against petitioner was "necessary" to vindicate certain "policy concerns" (see App. A-11). As respondents point out, those concerns included the district court's desire to protect itself from perceived "misuse," to "protect the interests of litigants" (presumably from non-litigants such as petitioner), and thus to "fulfill" the "promise of procedural fairness" which the court believed inheres in the Federal Rules of Civil Procedure. Opp. 9 (quoting App. C-8 to C-9); see also Opp. 11.

However, concluding that the power to impose sanctions upon a non-party is necessary to achieve policy objectives such as "[f]ulfilling the 'promise of procedural fairness' " (Opp. 11) is quite different from concluding that such a power is "necessary to the exercise of all other[]" judicial powers—*i.e.*, necessary for the *court* to function effectively. *Chambers* v. *Nasco, Inc.*, 111 S .Ct. 2123, 2132 (1991) (quoting *United States* v. *Hudson & Goodwin*), 11 U.S. (7 Cranch) 32, 34 (1812)). *This* is the inquiry required by the "rule of necessity." [2]

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litigation they wish to support, and will therefore either discourage such support or lead to interference with the attorney-client relationship. See Pet. 16-18.

[2] See also *Young* v. *U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 796 (1987) ("[t]he ability to punish disobedience to judicial orders is regarded *as essential* in ensuring that the Judiciary has a means to vindicate its own authority") (emphasis added); *Cooke* v. *United States*, 267 U.S. 517, 539 (1925) (contempt is a power "a judge *must have* and exercise in protecting the due and

Neither of the courts below even purported to address this critical question. Had they done so, they plainly could not have imposed sanctions upon petitioner, for reasons explained in the petition. Pet. 10-11.[3]

Second, respondents' attempt to distinguish the Fourth Circuit's decision in *Blue* v. *Department of the Army*, 914 F.2d 525 (4th Cir. 1990), *cert. denied, sub nom. Chambers* v. *Dep't of the Army*, 111 S. Ct. 1580 (1991) (see Opp. 11-13) rests upon a misreading of the facts in that case. Contrary to respondents' claim (Opp. 12-13), Julius Chambers, one of the attorneys sanctioned in *Blue*, was sanctioned both for his conduct prior to leaving his firm *and* for his conduct while Director-Counsel of the NAACP Legal Defense Fund (the "LDF"). *See Harris* v. *Marsh*, 123 F.R.D. 204, 223-228 (E.D.N.C. 1988). Indeed, the district court specifically imposed $4,000 in sanctions on Chambers for his conduct during the merits trial of Blue's claims (*id.* at 228), most of which occurred after Chambers moved to the LDF. Respondents also overlook the fact that the district court initially found the conduct of a second LDF attorney, Penda Hair, to be sanctionable as well. *Id.* at 215 n.11, 219-23. Because of the involvement of LDF attorneys in some of the conduct the court found to be sanctionable, the district court observed that assessing sanctions only against Chambers' private law firm would be "a problematic and somewhat unjustified proposition." *Id.* at 215 n.11. Hence, respondents are simply mistaken in

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orderly administration of justice . . ."); *Michaelson* v. *United States ex rel. Chicago, St. P., M., & O.R. Co.*, 266 U.S. 42, 65-66 (1924) (contempt power "is essential to the administration of justice").

[3] Moreover, respondents do not dispute that all of the specific instances of alleged misconduct found by the court of appeals could have been readied under Rule 11. See Pet. 10-11. Therefore, even the "policy concerns" cited by the courts below did not require that sanctions be imposed upon petitioner rather than the responsible attorneys.

asserting that all of the sanctioned conduct was "unrelated to . . . LDF employment." Opp. at 12.

Respondents are also wrong in asserting that unlike the petitioners here, LDF did not "finance" the litigation in *Blue*. Opp. at 13. LDF "sponsored" or "financed" the litigation in *Blue* by providing the services of its attorneys, Chambers and Hair, free of charge. *See Harris* v. *Marsh,* 123 F.R.D. at 219 n.13 (describing differing degrees to which LDF may become involved in cases). Similarly, PLF in this case supported the litigation by providing the services of attorneys on its staff. The fact that only PLF attorneys were involved in the instant case while non-LDF as well as LDF attorneys were involved in *Blue* is a distinction without a material difference.

Moreover, it is immaterial that there is no "preclusive order" in the present case explicitly preventing PLF from shifting the huge monetary sanctions imposed upon it to its individual attorney employees. It is unlikely that any public interest organization would shift such a burden to its employees, or that such organizations could long endure if they did so; hence there was no need for the court below to issue a "preclusive order" similar to that issued in *Blue*. Respondents, in short, cannot escape the fact that, in the decision below, the Ninth Circuit upheld just the kind of distributional judgment that the Fourth Circuit held impermissible in *Blue*: a judgment between the individual attorneys who committed the alleged misconduct and the entity that employed them. *See id.* at 549 (striking down district court's prohibition on contribution from the LDF); *id.* (striking down district court's sanction on Chambers' law firm and observing that "we are doubtful that . . . sanctions theories will support sanctions against an entire firm rather than against the individual lawyers who acted improperly"). Had the Ninth Circuit followed the holdings in *Blue*, the sanction imposed upon petitioner would have been set aside.

Third, much of respondents' submission (see Opp. 14-21) erroneously assumes that petitioner and, presumably, the other public-interest legal foundations that have appeared as *amici* here, are seeking a blanket "sanctions immunity" (Opp. 15) for all litigation-oriented public-interest organizations.

Thus, for example, respondents seek to minimize the significance of the Ninth Circuit's decision by pointing to *Avirgan* v. *Hull*, 932 F.2d 1572 (11th Cir. 1991), cert. denied, 112 S. Ct. 913 and *cert. denied*, 113 S. Ct. 405 (1992), in which the Eleventh Circuit upheld a sanctions award against a public-interest law firm. There, however, sanctions were explicitly premised upon the fact that the Christic Institute was plaintiffs' "official law firm" (*id.* at 1582), whereas the Ninth Circuit in this case affirmed a sanctions award against petitioner despite its finding that petitioner "is *not* a law firm" and was not itself representing the plaintiffs below (App. A-11 & n.2 (emphasis added)).

Petitioners and its *amici* do not contend that public-interest organizations are entitled to blanket immunity from litigation sanctions. But where, as here, the organization is not a party and is not itself representing any party (as it was in *Avirgan*), there simply is no justification for imposing sanctions upon the organization rather than the attorney or party who actually committed the misconduct at issue. Resort to the court's inherent power in such circumstances is lawless and inappropriate. See *supra* at 2; Pet. 8-13.

Most of respondents' remaining arguments are irrelevant for the same reason.[4] The issue here is not

[4] These include respondents' labored arguments that "California charitable corporations are regularly held responsible for the acts of their employees" (Opp. 14-15); that Congress has allowed sanctions to be imposed upon the Legal Services Corporation (Opp. 15-16); that under common-law agency principles a public-interest organization may be held liable for the actions of its agents (Opp.

whether an organization like petitioner is immune from litigation-related sanctions. Rather, the issue is whether a federal district court has inherent power to impose sanctions upon *any* person or organization that is neither a party nor an attorney, based upon the attorney's conduct of the litigation.[5]

2. Similarly, nothing in respondents' brief casts any doubt on the need to grant certiorari to resolve the second issue presented, *i.e.*, whether a district court may impose litigation sanctions upon an entity over whom the court lacks *in personam* jurisdiction. See Pet. i.

First, even if respondents were correct about the degree to which petitioner "participated" in the litigation below (Opp. 22-24), such participation is insufficient to confer *in personam* jurisdiction, for reasons explained in the petition (at 13-15).[6] Respondents do not dispute that

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20-21); that "public interest litigation does not require immunity from sanctions" (Opp. 18); and that neither a federal tax exemption (Opp. 16) nor the First Amendment (Opp. 19) confers immunity from sanctions awards. None of these arguments provides a basis for the exercise of inherent power to sanction someone who is neither an attorney nor a part of the litigation.

[5] Respondents also argue that, "[s]ince the PLF was the potential beneficiary of any attorney's fees awarded, equity also supports imposition [of sanctions] on the PLF." Opp. 16. While this argument goes to the merits rather than the need to review the decision below, respondents ignore the fact that any fees received by PLF would simply reimburse PLF for costs it had already incurred in supporting the litigation. A fee award would thus not have conferred a windfall upon PLF, and there is therefore no "equity" argument for imposing sanctions upon PLF rather than the attorneys who committed the alleged misconduct.

[6] Respondents do not and could not dispute that the district court was required to obtain personal jurisdiction over petitioner in order to impose sanctions against it. See, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("[A] court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.").

petitioner never became a party to the litigation by suing one of the defendants or by being served with process. Nor do respondents cite any authority in support of the Ninth Circuit's novel holding that what it termed "sponsorship" of litigation—*i.e.*, allegedly using plaintiffs as "pawns" or "puppets" (see App. A-11 to A-13)—is sufficient to confer *in personam* jurisdiction. See Opp. 23-24. Instead, respondents simply quote the Ninth Circuit's analysis (*id.*), as though mere repetition would give it more weight.[7]

Second, respondents' attempts to distinguish *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969), and *Panther Pumps & Equipment Co.* v. *Hydrocraft, Inc.*, 566 F.2d 8 (7th Cir. 1977), *cert. denied sub nom. Beck* v. *Morrison Pump Co.*, 435 U.S. 1013 (1978), are misguided. As petitioner demonstrated (Pet. 13-14)—and respondents do not dispute—the Ninth Circuit's analysis is indistinguishable from the "alter ego" theory which *Zenith* and *Panther Pumps* expressly rejected as a basis for *in personam* jurisdiction. 395 U.S. at 110; 566 F.2d at 23. The fact that those decisions "did not involve sanctions issues" (Opp. 26) is irrelevant.

Respondents' other distinction—their murky suggestion that the parties contesting jurisdiction in those cases did not "appear" until a later stage of the proceedings (see Opp. 26-27)—is both irrelevant and false. In both of those cases, the parties contesting jurisdiction entered appearances as soon as another party proposed that a judgment be entered against them. See 395 U.S. at 109; 566 F.2d at 22-23. In this case, petitioner entered an appearance at precisely the same point, *i.e.*, when respondents first formally proposed to impose sanctions on

[7] Respondents' recitation of the district court's analysis of the jurisdictional basis for its order (Opp. 22-23) is irrelevant. As explained in the Petition (at 13-14), the court of appeals expressly rejected the district court's conclusion that PLF itself is a law firm or that PLF, in its own capacity, represented the plaintiffs below.

petitioner itself. See CR 506, 510. The conflict between the decisions below on the one hand, and *Zenith* and *Panther Pumps* on the other, could hardly be more clear.

Third, respondents err in claiming (Opp. 24-25) that petitioner waived its jurisdictional objection. As a threshold matter, the courts below never invoked waiver as a reason for rejecting petitioners' objection.[8] Accordingly, respondents' waiver claim would not ordinarily be considered by this Court, even on the merits. See, *e.g.*, *Air Courier Conference* v. *American Postal Workers*, 111 S. Ct. 913, 917 (1991); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

In any event, PLF repeatedly contested the district court's *in personam* jurisdiction. For example, PLF's Objections to the Report and Recommendations of the Special Master included a section entitled "The Court Lacks Jurisdiction to Sanction Pacific Legal Foundation." There, PLF stated:

> PLF's primary objection to these proceedings has always been that it is neither a party nor an attorney in this action and thus cannot be held liable for sanctions. Notwithstanding the indisputable facts of PLF's status, the Report proposes to find PLF liable for sanctions under the Court's "inherent authority." Such authority can extend only so far as the Court's jurisdiction, however, and thus the Court should examine PLF's status in this case carefully.

CR 648 at 5 (emphasis added, footnote omitted).[9] While respondents quibble with PLF's failure to use the phrases

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[8] As explained in the petition (at 13-14), the district court responded to that objection by finding that PLF, in its own capacity, was the attorney for the plaintiffs, while the court of appeals rejected that theory in favor of its theory that PLF was the "sponsor" of the litigation and the plaintiffs mere "puppets" or "pawns" of PLF.

[9] PLF made the same argument in its first responsive pleading, which was an opposition to respondents' motion that petitioner be sanctioned:

"*in personam*" or "personal" jurisdiction, the basis for PLF's objection could hardly be more clear: Inasmuch as diversity had never been asserted as a basis for jurisdiction, and the district court obviously had subject matter jurisdiction over the underlying lawsuit, the court could not have understood PLF's argument as anything other than an objection on personal jurisdiction grounds.[10]

As pointed out in the joint brief of the NAACP and Mexican American Legal Defense and Educational Funds (at 4), the decision below "has grave implications for the ability of [public interest] organizations to carry out constitutionally protected activities." Nothing in respondents' submission casts any doubt on this conclusion or, more generally, on the necessity and propriety of review by this Court. To the contrary, this case is an excellent vehicle for resolving the existing confusion among the lower federal courts over the appropriate scope of a district court's "inherent power" to impose fee-shifting sanctions on public-interest organizations.

> Pacific Legal Foundation is not a party in this case. Pacific Legal Foundation has not signed a "pleading, motion, or other paper" to be filed in this Court. Pacific Legal Foundation is not admitted to practice law before this or any other Court of the United States or its territories.

CR 510 at 1.

[10] Respondents also argue that all objections to the court's lack of *in personam* jurisdiction were waived for failure to enter a "special appearance." Opp. at 24-25. While such an argument would have been valid more than half a century ago, the enactment of the Federal Rules of Civil Procedure eliminated the distinction between special and general appearances in federal court proceedings. See *Blank* v. *Bitker*, 135 F.2d 962, 966 (7th Cir. 1943).

CONCLUSION

For the foregoing reasons, and for those stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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